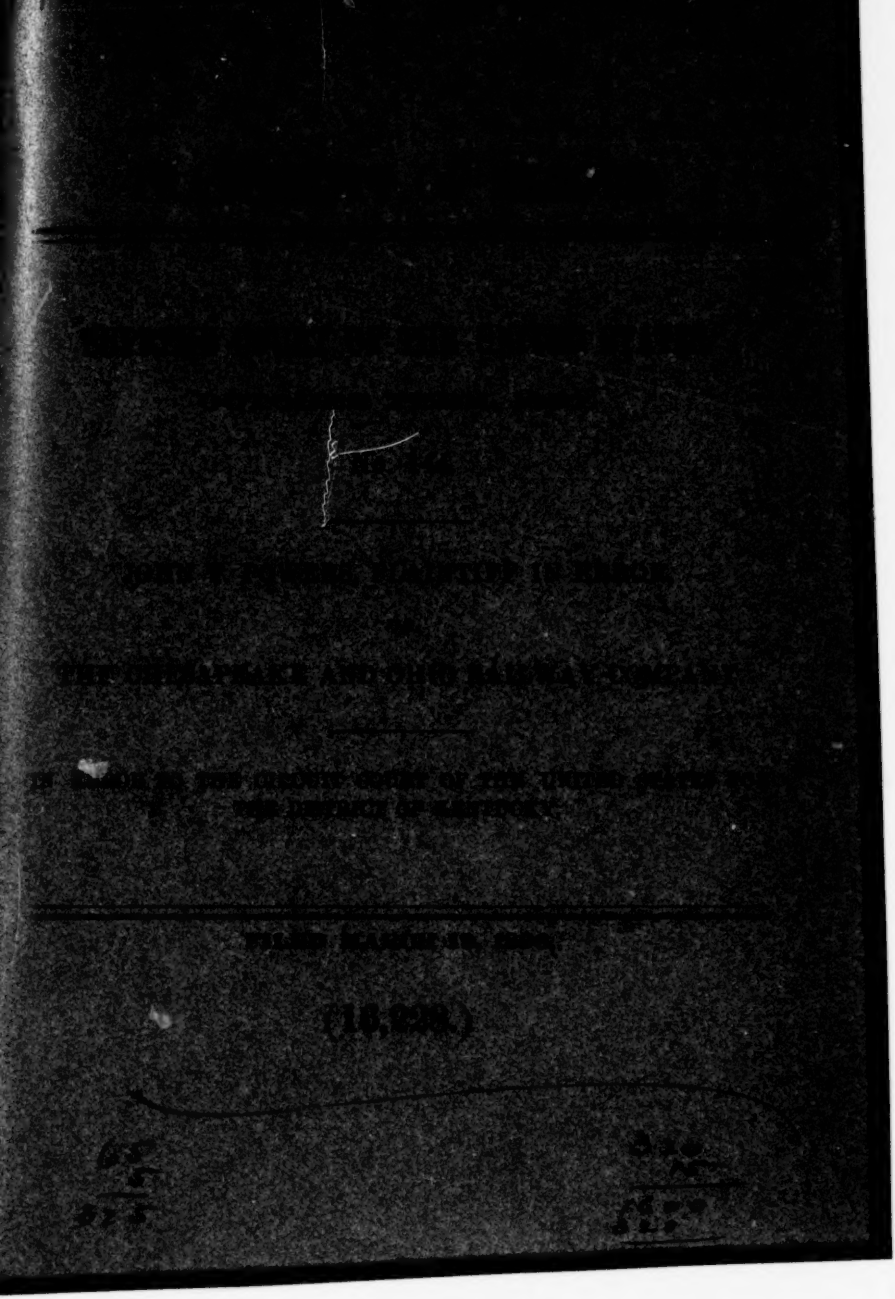

(16,228.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, PLAINTIFF IN ERROR,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1897.

1 UNITED STATES OF AMERICA,
District of Kentucky, at Covington.

At a regular term of the circuit court of the United States of America within and for the District of Kentucky (at Covington), in the sixth judicial circuit of the United States of America, begun and held at Federal Court hall, in said district, at Covington, on the first Monday in December, being also the second day of that month, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and twentieth.

Present: Hon. John W. Barr, sitting as circuit judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey, Defendants. } At Law.

2 Be it remembered that heretofore, to wit, on the 4th day of December, in the year of our Lord one thousand eight hundred and ninety-three, came the defendant The Chesapeake & Ohio Railway Company, by its attorneys, and in open court filed herein a certain transcript from the Kenton circuit court. Said transcript is clothed in words and figures following, to wit:

Pleas before the honorable the Kenton circuit court at the courthouse, in the city of Covington, on November 6, 1893.

Hon. Geo. G. Perkins, judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMpany, William D. Boyer, David Evans, and Edward Hickey, Defendants. } Ordinary. No. 924.

Be it remembered that on the 7th of September, 1893, the plaintiff filed the following petition:

Kenton Circuit Court, at Independence.

JOHN T. POWERS
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey. } Petition.

3 The defendant The Chesapeake & Ohio Railway Company is and at the times hereinafter stated was a corporation operating a railroad in the counties of Kenton and Campbell, in the

Commonwealth of Kentucky, with locomotive engines, cars, and other appurtenances thereunto belonging.

The defendants Boyer, Evans, and Hickey reside in Kenton county. On the 19th of November, 1891, plaintiff was the servant of the corporate defendant, employed by it as a switchman, and one of the crew of the defendants' switching engine number twenty-two (22). On said day, and while he was so in the service of the corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a switch of said defendant's said railway and to put a car on a side track of said defendant's said railway; and thereupon plaintiff did then and there, in said yard of the corporate defendant, enter upon the execution of said order and direction of said defendant, and while plaintiff was then and there in said yard of the corporate defendant at work executing said order and direction of said corporate defendant — of the defendants did with gross and wanton negligence run and operate locomotive engine of the corporate defendant and a tender and a caboose attached thereto against, upon, and over plaintiff, and thereby and by the gross and wanton negligence of all of the defendants plaintiff's right arm between the elbow and wrist was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise
4 seriously and permanently injured in his person. Said injury was so inflicted upon plaintiff in the night-time, when it was very dark. Said locomotive engine, tender, and caboose were — and there by the defendants with gross and wanton negligence run and operated backwards with said tender in front of said locomotive engine and nearest to plaintiff and said caboose behind said locomotive engine. Defendants then and there with gross and wanton negligence had no sufficient light nor any light nor other warning signal on said tender, locomotive engine, or caboose. Defendants then and there with gross and wanton negligence gave no signal or warning of any kind of the moving or the approach towards the plaintiff of said tender, locomotive engine, or caboose, nor did they have any person nor were they or either of them on the lookout on said tender, locomotive engine, or caboose or so placed or stationed as to give any signal or warning whatever of the moving or approach of said tender, locomotive, or caboose. In the committing of the wrongs aforesaid the defendants Boyer, Evans, and Hickey were each and all the agents and servants of the defendant The Chesapeake & Ohio Railway Company, and at the time and place of the committing of said wrongs, as aforesaid, the defendants Boyer, Evans, and Hickey were, respectively, conductor, engineer, and foreman of said train composed of said locomotive engine, tender, and caboose, and as such they had possession, direction, and control of and ran and operated said locomotive engine, tender, and caboose and jointly committed the wrongs herein
5 complained of.

By said injuries plaintiff was made and long continued ill. He suffered and long will continue to suffer great physical pain and mental anguish. He lost much time. He is thereby made a helpless cripple, unable to work at his vocation or any other or to earn

a support, and was damaged in the sum of twenty-five thousand dollars, for which and for costs he prays judgment.

WM. GOBEL,
Att'y for Plaintiff.

At a sitting of said court on Oct. 14, 1893—

"The defendant files a petition and tenders a bond for a removal to the circuit court of the United States."

The said petition and bond are as follows:

Your petitioner, The Chesapeake & Ohio Railway Company, says that it is the defendant in the above suit; that the matter and amount in dispute in the above-entitled action, exclusive of interest and cost, exceed the sum or value of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of twenty-five thousand ($25,000) dollars on account of injuries alleged to have been sustained by the plaintiff, John T. Powers, near Newport, on November 19, 1891, by reason of the gross and wanton negligence of defendant in running and operating its certain locomotive engine upon and over plaintiff.

That there is in said suit a controversy which is wholly
6 between citizens of different States, and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in the said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the State of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident and citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the defendants Wm. D. Boyer, David Evans, and Edward Hickey are fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of the petitioner to remove to the United States circuit court, and your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, on the first day of its next session, a copy of the record in this suit and paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept its surety and bond, and to
7 cause the record herein to be removed to the said circuit court of the United States for the district of Kentucky; and your petitioner will ever pray.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By HALLAM & MYERS AND
W. H. JACKSON, *Attorneys.*

Know all men by these presents that the Chesapeake & Ohio Railway Company, as principal, and Frank A. Prague, as surety, are held and firmly bound unto John T. Powers in the sum of two hundred dollars; for the payment of which, well and truly to be made, they thereby bind themselves firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio Railway Company has petitioned for removal to the United States circuit court for the district of Kentucky of a certain suit now pending in the Kenton circuit court, at Independence, wherein John T. Powers is plaintiff and the said Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey are defendants: Now, therefore, if said Chesapeake & Ohio Railway Company shall enter into the United States circuit court for the district of Kentucky, on the first day of its next session, a copy of the record in said suit and shall pay all costs that may be awarded by said court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this bond shall be void; otherwise to remain in full force.

F. A. PRAGUE.

Witnesses:

— —.

8 — a circuit court on October 23rd, 1893—

"The motion to remove to the circuit court of the United States is submitted."

At a sitting of said court on November 6, 1893—

"The plaintiff objects to the motion to remove. The bond for removal is approved, and the plaintiff excepts."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that this and the preceding 5 pages contain a complete and true transcript of the record named in the caption.

Witness my hand this 1st day of December, 1893.

H. C. HALLAM, *Clerk.*

And on a day following, to wit, on December 14th, 1893, plaintiff, John T. Powers, by his attorney, came and filed answer to petition for removal, same being clothed in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and Others, Defendants.

9 For answer to the petition for removal herein filed by the defendant The Chesapeake & Ohio Railway Company, plain-

tiff denies that there is in this suit a controversy which is wholly between citizens of different States, or a controversy which can be fully determined as between them, said alleged citizens of different States. He denies that the defendants Wm. D. Boyer, David Evans, and Edward Hickey or any of them were fraudulently or improperly joined as parties defendant herein or for the purpose of defeating the pretended right of removal of defendant The Chesapeake & Ohio Railway Company to the United States circuit court.

WM. GOEBEL,
Attorney for Plaintiff.

And on the same day, to wit, on December 14th, 1893, plaintiff came, by his attorney, and by leave of court filed amendment to transcript. Said amendment to transcript is clothed in words and figures following, to wit:

Kenton Circuit Court, Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO., WM. D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

10 On September 7, 1893, the following summons issued herein:

The Commonwealth to the sheriff of Kenton county:

You are commanded to summon the Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer, in twenty days after the service hereof, in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed or they will be proceeded against for contempt; and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

On December 12, 1893, said summons was returned to the clerk's office of said court with the following returns thereon:

"Executed the within summons by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake & Ohio Railway Co., he being the highest officer found in my county, the 26th day of September, 1893.

THOS. P. WILSON, *S. K. C.*"

"Executed the within summons by delivering to the within-named Wm. D. Boyer and David Evans a true copy hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOS. DUNN, *D. S.*"

11 Kenton Circuit Court, Kentucky.

I, H. C. Hallam, clerk of said court, certify that this and the next preceding page contain a complete and true transcript of that portion of the record in the cause named in the caption, which shows the issue of the summons, the summons itself, and the return thereon.

Witness my hand this December 13, 1893.

H. C. HALLAM, *Clerk.*

And on a day following, to wit, on December 18th, 1893, an entry was made herein; said entry was and is in words and figures following, to wit:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.*

This cause coming on to be heard on the motion of plaintiff to remand, came the parties, by their respective counsel, and made argument to the court upon said motion; whereupon the court, not being fully advised, takes time and said motion is submitted.

And on a day following, to wit, on January 10th, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

12

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.*

This cause coming on to be heard on the motion of plaintiff to remand same to the State court whence it was removed, the court, now being fully advised, files its written opinion sustaining said motion; and it is now ordered and adjudged that said case be, and same is, remanded, and the clerk of this court is directed to certify the proper record to the clerk of the Kenton circuit court, at Independence, Kentucky.

The opinion referred to in foregoing order was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
CHESAPEAKE AND OHIO R'Y CO. *et als.*

The petition in the Kenton circuit court, at Independence, alleged that the plaintiff, a servant of the Chesapeake & Ohio Railway Company, was injured through the negligence of the railway company and of the codefendants of the railway company, Boyer,
13 Evans, and Hickey, who were agents and servants of the defendant The Chesapeake & Ohio Railway Company in committing the wrongs averred.

The Chesapeake & Ohio Railway Company has removed the case on the ground that it is a resident and citizen of Virginia and that the plaintiff is a resident and citizen of Kentucky. The codefendants of the Chesapeake & Ohio Railway Company are admitted to be residents and citizens of Kentucky. The petition for removal was based on the theory that there was a separable controversy between the plaintiff and the Chesapeake & Ohio R'y Co. from that between the plaintiff and the other defendants. I do not think this theory can be sustained. The cause of action is single. It is for an injury caused by the negligence of the defendant and its servants, and the plaintiff has, as he had the right to do, joined the principals and the agents as defendants and as joint tort-feasors. The mere fact that the railway company may have a different defense from that of the other defendants does not make the controversy separable. This has been decided over and over again by the Supreme Court of the United States and does not call for citations.

Motion to remand is granted.

WM. H. TAFT.

Jan. 10, 1894.

14 And on a day following, to wit, December 3, 1894, came the defendant The Chesapeake and Ohio Railway Co., by its attorney, and in open court filed transcript of proceedings had in the Kenton circuit court. Said transcript was and is in words and figures as follows, to wit:

Pleas before the Hon. Geo. G. Perkins, judge of the Kenton circuit court, at the court-house, in Independence, Ky., on the 20th day of October, 1894.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, WILLIAM D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

Be it remembered that on the 7th day of September, 1893, the plaintiff filed his petition herein, which is as follows, to wit:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey, Defendants. } Petition. No. 924.

The defendant The Chesapeake and Ohio Railway Com-
15 pany is and at the times hereinafter stated was a corporation operating a railroad in the counties of Kenton and Campbell, in the Commonwealth of Kentucky, with locomotive engines, cars, and other appurtenances thereunto belonging. The defendants Boyer, Evans, and Hickey reside in Kenton county.

On the 19th day of November, 1891, plaintiff was the servant of the corporate defendant, employed by it as a switchman, and one of the crew of said defendant's switching engines numbered twenty-two (22).

On said day, and while he was so in the service of the corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a switch of said defendant's said railway and to put a car on a side track of said defendant's said railway, and thereupon plaintiff did then and there in said yard of the corporate defendant enter upon the execution of said order and direction of said defendant, and while plaintiff was then and there in said yard of the corporate defendant at work executing said order and direction of said corporate defendant all of the defendants did with gross and wanton negligence run and operate locomotive engine of the corporate defendant and a tender and a caboose attached thereto against, upon, and over plaintiff, and thereby and by the gross and wanton negligence of all the defendants plaintiff's right arm between the elbow and the wrist
16 was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise seriously and permanently injured in his person. Said injury was so inflicted upon plaintiff in the night-time when it was very dark.

Said locomotive engine, tender, and caboose were — and there by the defendants with gross and wanton negligence run and operated backwards, with said tender in front of said locomotive engine and nearest to plaintiff and said caboose behind said locomotive engine. Defendants then and there with gross and wanton negligence had no sufficient light nor other warning signal on said tender, locomotive engine, or caboose. Defendants then and there with gross and wanton negligence gave no signal or warning of any kind of the moving or the approach towards plaintiff of said tender, locomotive engine, or caboose, nor did they have any person nor were they or either of them on the lookout on said tender, locomotive engine, or caboose or so placed or stationed as to give any signal or warning whatever of the moving or approach of said tender, locomotive engine, or caboose. In the committing of the wrongs aforesaid the defendants Boyer, Evans, and Hickey were each and all the

agents and servants of the defendant The Chesapeake and Ohio Railway Company, and at the time and place of the committing of said wrongs as aforesaid the defendants Boyer, Evans, and Hickey were respectively conductor, engineer, and fireman of said train composed of said locomotive engine, tender, and caboose, and as such they had possession, direction, and control of and ran and operated said locomotive engine, tender, and caboose, and jointly committed the wrongs hereinbefore complained of.

17 By said injuries plaintiff was made and long continued ill. He suffer- and long will continue to suffer great physical pain and mental anguish. He lost much time. He is thereby made a helpless cripple, unable to work at his vocation or any other, or to earn a support, and was damaged in the sum of twenty-five thousand dollars; for which and for costs he prays judgment.

WM. GOEBEL,
Att'y for Plaintiff.

Whereupon the following summons issued, to wit:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summons the Chesapeake and Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer in twenty days after the service hereof in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

18 Which summons was returned by said sheriff as follows, viz:

Executed the within summons by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake and Ohio Railway Co., he being the highest officer found in my county, the 26th day of Sept., 1893.

THOS. P. WILSON, *S. K. C.*

Service served on me this 26th day of Sept., 1893.
CHAS. F. FIRTH, *Ag't.*

Executed the within summons by delivering to the within-named Wm. D. Boyer & David Evans a true copy, each hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOS. DUNN, *D. S.*

On the 14th day of October, 1893, the defendant The Chesapeake and Ohio Railway Company filed a petition and tendered a bond for the removal of this cause to the United States court.

Which petition for removal is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY Company, William D. Boyer, David
19 Evans, and Edward Hickey, Defendants.
} Petition for Removal.

Your petitioner, The Chesapeake and Ohio Railway Company, says that it is the defendant in the above suit; that the matter and amount in dispute in the above-entitled action, exclusive of interest and costs, exceed the sum or value of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of twenty-five thousand ($25,000) dollars on account of injuries alleged to have been sustained by the plaintiff, John T. Powers, near Newport on November 19, 1891, by reason of the alleged gross and wanton negligence of defendant in running and operating its certain locomotive engine upon and over the plaintiff.

That there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in the said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the State of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the said defendant-, Wm. D. Boyer, David Evans, and Edward Hickey, are fraudulently
20 and improperly joined as parties defendants for the sole purpose of defeating the right of petitioner to remove to the United States circuit court.

And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky on the first day of its next session a copy of the record in this suit, and paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept its surety and bond and to cause the record herein

to be removed to the said circuit court of the United States for the district of Kentucky.

And your petitioner will ever pray.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By HALLAM & MYERS,
W. H. JACKSON, *Attorneys.*

STATE OF KENTUCKY, }
County of Kenton. }

Charles F. Firth, being duly sworn, says that he is the agent of the Chesapeake & Ohio Railway Company, a corporation under the laws of the States of Virginia and West Virginia and
21 petitioner in the above-entitled cause; that he is duly authorized, and that the statements in the above petition for removal are true.

CHAS. F. FIRTH.

Sworn to before me and signed in my presence this 4th day of October, 1893.

J. M. MAHON,
N. P., Kenton Co., Ky.

And said bond is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, WILLIAM D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Bond.

Know all men by these presents that the Chesapeake & Ohio Railway Company, as principal, and Frank A. Prague, as surety, are held and firmly bound unto John T. Powers in the sum of two hundred dollars; for the payment of which, well and truly to be made, they hereby bind themselves firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio Railway Company has petitioned for removal to the United States circuit court for the district of Kentucky of a certain suit now pending in the Kenton circuit court, at Independence,
22 wherein John T. Powers is plaintiff and the said Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey are defendants: Now, therefore, if said Chesapeake & Ohio Railway Company shall enter into the United States circuit court for the district of Kentucky on the first day of its next session a copy of the record in said suit and shall pay all costs that may be awarded by said court if said court shall hold that said suit was wrongfully or improperly removed thereto, then bond shall be void; otherwise to remain in full force.

F. A. PRAGUE.

Witnesses:

——— ———.

On January *January* 12, 1894, a transcript of proceedings in the United States court was filed and is as follows:

Proceedings had in the circuit court of the United States for the sixth judicial circuit and district of Kentucky, begun and held at the Federal Court hall, in the city of Covington, on the 4th day of December, A. D. 1893, and of our Independence this 118th year.

Court met.

Present: Hon. John W. Barr, sitting as circuit judge.

Be it remembered that heretofore, to wit, on December 4th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
C. & O. R'Y Co. *et al.* } 1864.

This day came W. H. Jackson, of counsel for the C. & O.
23 R'y Co., and in open court filed a transcript of the proceedings had herein in the Kenton circuit court, and on his motion it is ordered that this case be placed on the common-law side of the docket of this court for further proceedings therein.

On December 14th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

This day came the plaintiff, by Wm. Goebel, Esq., of counsel, and filed answer to the petition for removal of this cause to this court. Came again the plaintiff, by his said counsel, and by leave of court now files an amendment to the transcript filed herein by the defendant, it appearing that a part of the proceedings had herein in the State court were not incorporated in the original transcript.

The answer to the petition for removal referred to in the foregoing order is as follows, viz:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. *et al.* } Answer to Petition for Removal.

24 For answer to the petition for removal herein filed by the defendant The Chesapeake & Ohio Railway Co., plaintiff denies that there is in this suit a controversy which is wholly between citizens of different States or a controversy which can be fully determined as between them, said alleged citizens of different States.

He denies that the defendants Wm. D. Boyer, David Evans, and Edward Hickey or any of them were fraudulently or improperly joined as parties defendants herein or for the purpose of defeating the pretended right of removal of defendant The Chesapeake & Ohio R'y Co. to the United States circuit court.

WM. GOEBEL,
Attorney for Plaintiff.

The amendment to transcript, &c., referred to in the above order is as follows, viz:

Kenton Circuit Court, Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., WM. D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

On September 7th, 1893, the following summons issued herein:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the Chesapeake & Ohio
25 Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer, in twenty days after the service hereof, in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed and they will be proceeded against for contempt; and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

On December 12th, 1893, said summons was returned to the clerk's office of said court with the following returns thereon:

Executed by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake & Ohio Railway Co., he being the highest officer found in my county, this 26th day of September, 1893.

THOS. P. WILSON, *S. K. C.*

Executed the within summons by delivering to the within-named Wm. D. Boyer and David Evans a true copy hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOMAS DUNN, *D. S.*

26 Kenton Circuit Court, Kentucky.

I, H. C. Hallam, clerk of said court, certify that this and the next preceding page contains a complete and true transcript of that part of the record in the said cause named in the caption which shows the issue of the summons, the summons itself, and the return thereon.

Witness my hand this December 13, 1893.

H. C. HALLAM, *Clerk.*

On December 18th, A. D. 1893, the following order was entered herein, viz:

J. T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

This cause coming on to be heard on the motion of the plaintiff to remand, came the parties, by their respective counsel, and made argument to the court upon said motion. Whereupon the court, not being fully advised, takes time and said motion is submitted.

On January 10th, A. D. 1894, the following order was entered herein, viz.

J. T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

27 This cause coming on to be heard on the motion of plaintiff to remand same to the State court from whence it was removed, the court, being now fully advised, files written opinion sustaining said motion, and it is now ordered and adjudged that said cause be, and same is, remanded and the clerk of this court is directed to certify the proper record to the clerk of the Kenton circuit court at Independence, Kentucky.

The opinion of the court referred to in the foregoing order is as follows, viz:

Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
CHESAPEAKE & OHIO RAILWAY CO. *et al.* }

The petition in the Kenton circuit court, at Independence, alleged that the plaintiff, a servant of the Chesapeake & Ohio Railway Co., was injured through the negligence of the railway company and of the codefendants of the railway company, Boyer, Evans, and Hickey, who were agents and servants of the Chesapeake & Ohio Railway Company in committing the wrongs averred.

The Chesapeake & Ohio Railway Co. has removed the case on the grounds that it is a resident and citizen of Virginia, and that the plaintiff is a resident and citizen of Kentucky.

28 The codefendant- of the Chesapeake & Ohio Railway Co. are admitted to be residents and citizens of Kentucky.

The petition for removal was based on the theory that there was a separable controversy between plaintiff and the Chesapeake & Ohio R'y Co. from that between the plaintiff and the other defendants. I do not think this theory can be sustained.. The cause of action is single. It is for an injury caused by the negligence of defendant and its servants, and the plaintiff has, as he had the right to do, joined the principals and the agents as defendants and as joint tort-feasors. The mere fact that the railway company may have a different defense from that of the other defendants does not make the controversy separable.

This has been decided over and over again by the Supreme Court of the United States and does not call for citations.

Motion to remand is granted.

January 10th, 1894.

WM. H. TAFT.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Joseph C. Finnell, clerk of the United States circuit court for the sixth judicial district and circuit of Kentucky, at Covington, hereby certify that the foregoing is a true and perfect copy of the proceedings had in this court in the case set out in the caption hereto as the same now appears from the records and files of
29 said case in this office.

Witness my hand and the seal of said court, at Covington, this 11th day of January, A. D. 1894, and of our Independence the 118th year.

JOSEPH C. FINNELL, *Clerk*,
By F. D. COCHRAN, *D. C.*

On the 6th day of February, 1894, the Chesapeake and Ohio R'y Co. filed an answer herein, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, &c., &c., Defendants.

Answer of C. & O. R'y Co.

Defendant says that the petition does not state facts sufficient to constitute a cause of action against it.

2nd. The defendant The Chesapeake and Ohio Railway Company for answer denies that the plaintiff was by it ordered or directed to throw a switch of its railway or to put a car on a side track of this defendant's said railway, or that he did enter upon the execution of such order or direction, or that while at work executing such order or direction or at any time this defendant did with

gross and wanton or any negligence run or operate any locomotive engine, tender, or caboose against, upon, or over plaintiff, or that by the gross or wanton or any negligence of this defendant plaintiff was injured.

30 It denies that with gross or wanton or any negligence it had not sufficient light or signal warning on said tender, locomotive engine, or caboose. It denies that with gross or wanton or any negligence it gave no signal or warning of the moving or approach of said tender, locomotive engine, or caboose.

It denies that it did not have any person on the lookout or so placed or stationed to give signal or warning.

It denies that in the committing of the alleged wrongs its co-defendants were its agents or servants, but says that they were the fellow-servants of the plaintiff in this case.

3rd. For further answer this defendant says that the injuries complained of in the petition were caused by the contributing negligence of the plaintiff himself, in that he did not look or listen for the approach of any railway train at the time of the happening of said injuries, and but for such contributing negligence said injuries could not have occurred.

4th. This defendant says that the injuries complained of did not occur within one year before the bringing of this action, and it pleads and relies on the statutes of limitation in such cases made and provided.

Wherefore it prays to be dismissed with its costs.

HALLAM & MYERS,
Att'ys for Defendant.

31 THE STATE OF KENTUCKY, }
Kenton County. }

Charles F. Firth says he is freight agent of the defendant The Chesapeake & Ohio Railway Co. in this county, and that there is no other chief officer in Kenton county, and that the statements of the foregoing answer are true.

C. F. FIRTH.

Subscribed and sworn to before me by said Chas. F. Firth this 3rd day of February, 1894.

J. M. MAHON,
N. P., K. Co., Ky.

At a circuit court for said county begun and held in the court-house, in the town of Independence, on the 20th day of February, 1894, the following order was had herein, viz:

JOHN T. POWERS }
vs.
THE C. & O. R'Y CO., &c. }

This cause is continued.

And afterwards, again, at a circuit court held in the court-house aforesaid and on the 16th day of October, 1894, the following order was had therein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE AND OHIO RAILWAY CO., &c.

32 On the motion of the plaintiff this cause is discontinued except as to the defendant The Chesapeake and Ohio Railway Company. The demurrer and the motion to transfer are each overruled and defendant excepts to each ruling. The plaintiff files a reply. The defendant files a petition and tenders a bond for a removal to the circuit court of the United States, and the plaintiff objects. The court declines to approve said bond, but not for lack of sufficiency thereof, and overrules said motion to remove, and defendant excepts. The defendant files an amended answer. By consent said amended answer is traversed of record. The following-named jurors are duly elected and sworn, viz., J. R. M. Ellis, T. J. Sellers, L. N. Hoffman, William M. Cain, John G. Hogriffe, James T. Culbertson, Charles Roth, J. B. Conner, W. H. Hoffman, J. R. Rouse, A. J. Stewart, and William McElroy. The defendant files a rejoinder. The jury hears the testimony produced by the parties and court adjourned till tomorrow at 9 o'clock a. m.

The petition for removal referred to in the above order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY. } Petition for Removal.

Your petitioner, The Chesapeake & Ohio Railway Company, shows that it is the defendant in the above suit; that the matter
33 and amount in the above-entitled action, exclusive of interest and costs, exceed the sum of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of —— dollars for personal injuries received by said John T. Powers, at Newport, Kentucky, on November 19, 1891, by being struck by an engine of the said Chesapeake & Ohio railway, resulting in his having his right arm cut off; that there is in said suit a controversy wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, the defendant in said suit, who says that it was at the commencement of this suit and still is a corporation organized under the laws of the States of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now either a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and

citizen of the State of Kentucky. Your petitioner further says that in the bringing of this suit heretofore on the — day of ——, 189–, David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant in the above-entitled cause for the purpose of defeating the right of your petitioner to remove this cause to the United States circuit court; that because of the joinder of said Evans and Hickey said cause was remanded to the State court.

Your petitioner says that the suit as to said Evans —
34 Hickey was, on the 16th day of October, 1894, dismissed.

That the said cause is now for the first time pending as *the* the said Chesapeake & Ohio Railway Company alone.

And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, being the proper district, on the first day of its next session, a copy of the record in this suit, and paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept such surety and bond and to cause the record herein to be removed to the said circuit court of the United States for the district of Kentucky; and he will ever pray.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By HALLAM & MYERS,
W. H. JACKSON,
Att'ys for C. & O. R'y Co.

STATE OF KENTUCKY, }
County of Kenton. }

William H. Jackson, being duly sworn, says that he is the agent and attorney of the Chesapeake & Ohio Railway Company, a corporation under the laws of Virginia and West Virginia and
35 petitioner in the above-entitled cause, and that there is no executive or chief officer of said corporation within the county, and that he is duly authorized, and that the statements in the above petition for removal are true.

WILLIAM H. JACKSON.

Sworn to before me and signed in my presence this 16 day of October, 1894.

H. C. HALLAM, *Clerk.*

The bond referred to in the foregoing order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO. } Bond.

Know all men by these presents that the Chesapeake & Ohio R'y Co., as principal, and Harvey Myers, as surety, are held and firmly bound unto John T. Powers in the sum of five hundred dollars ($500); for the payment of which, well and truly to be made, they hereby bind themselves, their successors, heirs, &c., firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio R'y Co. has petitioned to remove the above cause unto the U. S. circuit court for the district of Kentucky:

Now, therefore, if the said Chesapeake and Ohio R'y Co. shall file a correct transcript or cause the same to be filed in the said
36 U. S. circuit court for the district of Ky. on or before the first day of the next term thereof, and shall pay all costs if it shall be held that this was wrongfully or unlawfully removed, then this bond shall be void; otherwise to remain in full force and virtue of law.

HARVEY MYERS.

The reply referred to in the foregoing order is as follows, viz.:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, &C., Defendants. } Reply to Answer of C. & O. R'y Co.

For reply to the second paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff denies that the codefendants of defendant The Chesapeake and Ohio Railway Company, or any of them, were the fellow-servants of plaintiff.

For reply to the third paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff denies that his injuries or any of them were in any way or to any extent caused by the contributing negligence or any negligence of plaintiff, either in that he did not look or listen for the approach of railway train or otherwise. He denies that he did not look or listen for the approach of railway train before and at the time of the hap-
37 pening of his said injuries. He denies that but for his said alleged contributing negligence his said injuries could not or would not have occurred. He denies that he was in anywise or to any extent negligent, and denies that he in any way contributed to his said injuries or any of them.

For reply to the fourth paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff says that at

the time when he was injured, as in his petition set out, he was an infant, not having attained the age of twenty-one years; that he was born on the 8th day of September, 1871, and did not attain the age of twenty-one years until the 8th day of September, 1892, when the statute of limitations began to run against his cause of action herein sued on, and this action was begun on the 7th day of September, 1893, by the filing of his petition and having summons duly issued and served thereon within one year after the statute of limitations began to run against his said cause of action.

He prays as in his petition.

WM. GOEBEL,
For Plaintiff.

STATE OF KENTUCKY, }
Kenton County. }

The plaintiff, John T. Powers, says the statements contained in the foregoing reply are true.

Subscribed and sworn to before me by said John T. Powers this 16th day of October, 1894.

——— ———.

38 The amended answer referred to in the foregoing order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE AND OHIO R'Y CO., Defendant. } Amendment.

For amendment to the third paragraph of its answer, the defendant, objecting to the jurisdiction of the court, says that the plaintiff was guilty of such contributory concurrent negligence, but for which the injuries to him would not have occurred, in that he voluntarily and without order or direction of this defendant or any of its agents or officers and not in the performance of any duty voluntarily placed himself upon the track of the locomotive engine in the petition mentioned and directly in its way, and was thereby injured.

W. H. JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

STATE OF KENTUCKY, }
Kenton County. }

W. H. Jackson says he is attorney for the defendant, The C. & O. R'y Co., neither of whose chief officers are in Kenton county, and says the statements of the foregoing amended answer are true as he verily believes.

W. H. JACKSON.

39 Subscribed and sworn to before me by said Jackson this 16th October, 1894.

H. C. HALLAM, *Clerk.*

The rejoinder referred to in the foregoing order is as follows, viz:

Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
vs.
C. & O. R'Y Co., Defendant. } Rejoinder.

For rejoinder the defendant denies that the plaintiff was born September 8, 1871, and denies that he did not become of age until September 8, 1892, and prays as before.

JACKSON MYERS.

And afterwards, again at the same term of court and on the 17th day of October, 1894, the following order was had herein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'Y Co. } 924.

Came the parties and their attorneys and the same jury as of yesterday, who, after hearing argument of counsel and receiving instructions from the court, retired to their room and thence into court with the following verdict: "We, the jury, find for the plaintiff in the sum of ten thousand dollars ($10,000.00). W. H.
40 Hoffman, J. R. M. Ellis, Wm. M. Cain, J. R. Rouse, J. B. Conner, Ch. Roth, L. N. Hoffman, J. E. Culbertson, Wm. McElroy, A. J. Stewart, and J. G. Hogreefe." It is therefore adjudged by the court that the plaintiff recover of the defendant, The Chesapeake and Ohio Railway Company, the sum of ten thousand dollars ($10,000.00) and his costs herein expended.

The instructions given to the jury by the court are as follows:

1st. If the jury find from all the testimony in this cause that plaintiff Powers was, by the foreman of the crew of which he was a member, ordered to throw the switch and put on a side track the car in the testimony mentioned, and that plaintiff then and there did attempt to carry out said order, and if the jury find from all the testimony that while plaintiff was attempting to carry out said order, if such order was given and if he did attempt to carry out the same, he was struck and injured by the tender of locomotive engine number 56, in the testimony described; and if the jury further find from all the testimony that the servants of the defendant company in charge and control of said locomotive engine number 56 and the tender thereof then and there where plaintiff was injured negligently failed to display on said tender any warning signal light, and then and there negligently failed to ring the bell and blow the whistle of said locomotive engine number 56, and if the jury find from all the testimony that such failures, if such
41 failures there were, amounted to and were gross negligence, as hereafter defined in these instructions, and that plaintiff's injuries resulted therefrom, and if the jury find from all the testimony that up to the time he was injured and at the time and place

when and where he was injured plaintiff was himself in the exercise of ordinary care, as hereafter defined in these instructions, and if the jury find from the testimony that plaintiff was born on September 8th, 1871, then the jury must find for the plaintiff.

2nd. If the jury find for the plaintiff, the measure of his damages will be a reasonable compensation in money for his pain and suffering of body and mind, if any, for his loss of time, if any, and for the impairment of his power to earn money, if any, as the natural and proximate result of his injuries, in the testimony described, not exceeding twenty-five thousand dollars; and in estimating the amount of the damages the jury will, if they find for the plaintiff, take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration.

3rd. If the jury shall find from the evidence that the defendant was negligent in operating its engine, and shall also find that plaintiff was himself negligent, and that said negligence of plaintiff amounted to and was a want of ordinary care under the circumstances, and that but for such negligence of plaintiff, if any there was, he would not have been injured, then the jury will find for the defendant.

42 4th. Gross negligence is the failure to exercise slight care.

5th. Ordinary care is such care as persons of ordinary care and caution ordinarily exercise in the same or similar business under the same or similar circumstances.

6th. The court instructs the jury that the burden of proof is upon the plaintiff to prove negligence in the operation of the engine which caused the injury to the plaintiff.

7th. The plaintiff, being a servant and employee of the defendant, accepted the ordinary risks, perils, and hazards of his employment; and unless the jury find that the defendant's servants in charge of the locomotive tender which struck plaintiff were guilty of gross negligence in its operation, they shall find for defendant.

8th. Nine members of the jury may find a verdict; but if less than the entire jury return a verdict, then all those members of the jury that join in the verdict must sign it.

The following are the instructions the court refused to present to the jury, viz:

9th. Gross negligence is such want of care as indicates a reckless or wanton disregard of the rights of others

10th. If the jury find that the defendant, its servants or agents, were guilty of gross negligence in the operation of its locomotive engine and tender in the proof described, but nevertheless find that such negligence was not the proximate cause of the injury to

43 · plaintiff, they should find for defendant.

11th. The jury are instructed that it was the duty of the plaintiff in working along by the side of the track of defendant, in such close proximity to it as to be liable to be struck by a passing train, to look carefully in both direction- for the approach of trains.

12th. It was the duty of plaintiff, if there was sufficient room between the two tracks of defendant at the place in the proof described,

to walk and keep his body in such place as that passing trains upon neither track would strike him.

13th. It was the duty of the plaintiff to avoid placing himself immediately in a position of danger; and if you find that he walked so near the track upon which the engine was approaching as to be in danger of a collision, and that there was ample room between the tracks without such danger, then the plaintiff was guilty of contributory negligence and cannot recover.

14th. If you find that there was ample opportunity for the plaintiff to alight on the side opposite from the track upon which the engine was approaching that caused the injury, then he was guilty of contributory negligence and cannot recover.

15. If the jury believe from the evidence there was sufficient room or space between the tracks of defendant at the place in the proof described for plaintiff to have safely passed without being struck by the train in the proof described, they shall find for the defendant.

44 And afterwards, at the same term of court and on the 19th day of October, 1894, the following order — had therein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE AND OHIO R'Y CO. } 924.

The defendant, The Chesapeake and Ohio Railway Company, filed motion and grounds for a new trial.

The motion and grounds for a new trial referred to above are as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant. } Moti-n and Grounds for New Trial.

The defendant, The Chesapeake and Ohio Railway Company, move- the court for a new trial of this cause upon the following grounds, to wit:

1. The damages awarded by the verdict are excessive and appear to have been given under the influence of passion and prejudice.

2. The damages were excessive and were given by the jury under the influence of passion and prejudice.

3. The verdict is not sustained by sufficient evidence.

4. The verdict is contrary to law.

45 5. The verdict is not sustained by the evidence and is contrary to the law.

6. The court erred in refusing to accept the defendant's petition for removal of this cause to the circuit court of the United States and approve its bond and proceed no further herein.

7. The court erred in proceeding with the trial of this cause after the tender of the petition and bond for removal of the same to the circuit court of the United States for the district of Kentucky.

8. Because the court had no jurisdiction to proceed with, try, hear, or determine this cause after the tender of the said petition and bond.

9. The court erred in overruling the defendant's motion to peremptorily instruct the jury to find a verdict for it upon the conclusion of plaintiff's testimony.

10. The court erred in admitting testimony of the plaintiff objected to at the time it was offered.

11. The court erred in admitting testimony on behalf of plaintiff of the witness Sullivan, which was objected to at the time it was offered.

12. The court erred in admitting testimony of the witnee- Buckley on cross-examination, which testimony was objected to at the time it was offered.

13. The court erred in admitting the testimony of the witness McKnaib, which was objected to by the defendant at the time.

14. The court erred in giving instruction number 1 offered
46 by plaintiff.

15. The court erred in giving instruction number 2 offered by the plaintiff.

16. The court erred in giving instruction number 3 offered by plaintiff.

17. The court erred in giving instruction number 4 offered by plaintiff.

18. The court erred in giving instruction number 5 offered by plaintiff.

19. The court erred in refusing to give instruction number 9 offered by defendant.

20. The court erred in refusing to give instruction number 10 offered by defendant.

21. The court erred in refusing to give instruction number 11 offered by defendant.

22. The court erred in refusing to give instruction number 12 offered by defendant.

23. The court erred in refusing to give instruction number 13 offered by defendant.

24. The court erred in refusing to give instruction number 14 offered by defendant.

25. The court erred in refusing to give instruction number 15 offered by defendent.

26. The court erred in refusing to instruct the jury to find a verdict for it at the conclusion of all the testimony.

W. H. JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

47 27. The court erred in permitting the plaintiff to testify to any rule of the defendant concerning the operation of its trains.

28. The court erred in permitting the plaintiff to testify what disposition was made of him after the injury.

29. The court erred in permitting the plaintiff to testify what time he had lost by reason of the injury.

30. The court erred in permitting the witness Chas. Sullivan to testify as to conversations between him and plaintiff prior to the accident.

JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

And afterwards, at the same court and on the 20th of October, 1894, the following order was had herein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. } 924.

The motion and grounds for a new trial herein are overruled, and defendant, The Chesapeake and Ohio Railway Company, excepts and prays an appeal to the court of appeals, which is granted.

Thereupon the defendant gave the following supersedeas bond, viz:

48 Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
vs.
C. & O. R'W'Y Co., &c., Defendant. }

We undertake that the defendant The Chesapeake & Ohio Railway Company will pay to the plaintiff all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said court, rendered October 20, 1894, for $10,000.00, and interest and costs; also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the appellate court may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment appealed from.

Witness our hands this 30th day of October, 1894.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNELLY, *D. C.*

STATE OF KENTUCKY:

Kenton Circuit Court, at Independence.

I, H. C. Hallam, clerk of said court, do certify that this and the foregoing 46 pages contain a true and complete transcript of the record and proceedings had in this court in the case set out in the

caption hereto as the same now appears from the records and
49 files of said cause in this office, except subpœnas issued herein.
Witness H. C. Hallam, clerk of said court, this 30th November, 1894.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

50 And on a day following, to wit, on December 6th, 1894, certain affidavits were filed, said affidavits being in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

STATE OF KENTUCKY, *County of Kenton*, } *sct:*

William D. Boyer, being by me first duly sworn, says that he is the same William D. Boyer who was joined as a defendant in the suit of John T. Powers *vs.* The Chesapeake and Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey in the Kenton circuit court, at Independence, Kentucky. Affiant says that at the October term of said Kenton circuit court, at Independence, the said suit was discontinued as to him, the said William D. Boyer, and as to said David Evans and Edward Hickey; and affiant further says that said discontinuance as to him was made by plaintiff's attorney and without any request having been made by this affiant and without any knowledge on his part; and affiant further says that the discontinuance as to him was wholly without consideration
of any kind; that he did not pay or agree to pay to the said
51 plaintiff or his attorney anything whatsoever for the discontinuance of said case; that said discontinuance was wholly without consideration and without his request or knowledge.
And further affiant saith not.

WILLIAM D. BOYER.

Subscribed in my presence and sworn to before me this 30th day of November, 1894.

JOEL BAKER,
Notary Public, Kenton Co., Ky.

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

STATE OF KENTUCKY, *County of Mason*, } *sct:*

David Evans, being by me first duly sworn, says that he is the same David Evans who was joined as a defendant in the suit of

John T. Powers *vs.* The Chesapeake & Ohio Railway Company, William D. Boyer, David T. Evans, and Edward Hickey in the Kenton circuit court, at Independence, Kentucky.

Affiant says that at the October term of said Kenton circuit court, at Independence, the said suit was discontinued as to him, the said David Evans, and as to the said William D. Boyer and Edward Hickey; and affiant further says that said discontinuance as to him was made by plaintiff's attorney and without any request
52 having been made by this affiant and without any knowledge on his part; and affiant further says that said discontinuance as to him was wholly without consideration of any kind; that he did not pay or agree to pay to the said plaintiff or his attorney anything whatsoever for the discontinuance of said case; that said discontinuance was wholly without consideration and without his request or knowledge.

And further affiant saith not.

DAVID T. EVANS.

Subscribed and sworn to before me this 1st day of December, 1894, by David T. Evans.

FRANK P. O'DONNELL,
Notary Public for Mason County, Kentucky.

And on a day following, to wit, December 8th, 1894, came plaintiff, by his attorney, and filed certain motion herein; said motion was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

53 Plaintiff moves this court to remand this cause to the State court because:

First. The cause was not removable under the statute governing the removal of cases from State to Federal courts.

Second. The petition and bond for removal were not filed within the time fixed by law for the filing thereof.

Third. The question sought now to be made by the second petition for removal has been heretofore adjudicated by this court, and said former adjudication is relied on in bar of this second removal proceeding.

WM. GOEBEL,
For Plaintiff.

And on the same day, to wit, on December 8th, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

This cause coming on to be heard on the motion to remand same to the State court, came the parties, by their attorneys, and made oral argument to the court; whereupon the court, not being fully advised of the judgment it is proper to render herein, takes
54 time. The plaintiff is given until Wednesday, December 12th, to file brief and said motion is submitted.

And on a day following, to wit, on December 11th, 1894, came plaintiff, by his attorney, and filed answer to petition for removal; said answer was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

For answer to the removal petition herein plaintiff denies that the defendants Evans and Hickey or either of them were joined as parties defendant, either fraudulently or improperly or for the purpose of defeating the alleged right of removal of defendant, The Chesapeake & Ohio Railway Company.

WM. GOEBEL,
Att'y for Plaintiff.

55 And on a day following, to wit, on December 22, 1894, the defendant, The Chesapeake & Ohio Railway Company, by its attorney, filed motion herein; said motion was and is in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO., Defendant.

Now comes the defendant, The Chesapeake & Ohio R'y Co., and moves the court for leave to file an amendment to its petition for removal, heretofore filed on October 16th, 1894, and for leave to file affidavits herein.

W. H. JACKSON,
Attorney for the Chesapeake & Ohio Railway Company.

And on the same day, to wit, on December 22, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

56 JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

Now come the defendant, The Chesapeake & Ohio Railway Company. This cause coming on to be heard upon the motion of defendant for leave to file an amendment to its petition for removal heretofore filed on October 16th, 1894, and for leave to file affidavits herein, and the court having examined said amendment to said petition for removal and the said motion and affidavits, it is ordered that the amended petition and affidavits be filed and stand as a part of the record in this case. Plaintiff objects to said motion and excepts to the ruling of the court thereon.

The amendment referred to in the foregoing entry was and is in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Your petitioner, The Chesapeake & Ohio R'y Co., comes
57 and, with leave of court and by way of amendment to its petition for removal heretofore filed in the Kenton circuit court, at Independence, Ky., on October 16th, 1894, reiterates the averments of its said petition as fully as if herein incorporated, except as hereinafter modified and changed, and states that in the bringing of the original suit herein, to wit, on the 7th day of September, 1893, W. D. Boyer and Edward Hickey were fraudulently and improperly joined as parties defendant in the said suit and for the sole purpose of defeating the right of your petitioner to remove this case to the United States circuit court, and that upon a petition for removal by your petitioner, heretofore made and acted upon, said case was remanded to the State court solely because of such fraudulent and improper joinder. Your petitioner states, further, that, at the time of the bringing of said suit and before and since, the said Boyer and Hickey and each of them were citizens and residents of the State of Kentucky and resident in the city of Covington, and that the other codefendant, David Evans, was at the time and since a citizen and resident of the State of Virginia, and that immediately upon the discontinuance of said case as to the said defendants the case was forced to trial, thereby leaving to counsel but a few minutes in which to prepare a petition and bond for removal, and that under these circumstances in writing said petition for removal the draft-man, who was required to write the same in great haste, inadvertently — by mistake wrote in said petition the
58 name of David Evans, when it was intended to write the name of William D. Boyer, and which mistake and clerical error it is now intended to cancel.

Your petitioner further states that the said suit was on the 16th

day of October, 1894, dismissed as to each of the defendants Boyer, Evans, and Hickey, and was then for the first time pending as to the petitioner alone.

Your petitioner further states that by reason of the said improper and fraudulent joinder of said William D. Boyer and Edward Hickey, which it avers was for the sole purpose of defeating the jurisdiction of the United States court, the plaintiff, John T. Powers, is estopped by his fraudulent and improper conduct from now asserting that said petition for removal was not filed within the time required by law for the filing of a petition for removal.

And your petitioner says that this case is now rightfully pending in the United States circuit court for the district of Kentucky, and prays this honorable court to maintain its rightful jurisdiction herein.

THE CHESAPEAKE & OHIO R'Y CO.,
By W. H. JACKSON, *Its Attorney.*

STATE OF OHIO, }
County of Hamilton, } *ss:*

William H. Jackson, being first duly sworn, says that he is the agent and attorney of the Chesapeake & Ohio R'y, a corporation under the laws of the States of Virginia and West Virginia and petitioner in the above-entitled case, and that there is no
59 executive or chief officer or agent of said corporation within Kenton county, Kentucky; that he is duly authorized herein, and that the statements in the above petition for removal are true.

W. H. JACKSON.

Sworn to before me and subscribed in my presence this 21st day of December, 1894.

MAURICE L. GALVIN,
Notary Public, Hamilton County, Ohio.

The affidavits referred to in the foregoing entry were and are in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS }
vs. }
THE CHESAPEAKE & OHIO R'Y CO. }

STATE OF KENTUCKY, }
County of Kenton, } *ss:*

William D. Boyer, being by me first duly sworn, says that he is the William D. Boyer who was originally sued as defendant in the above-entitled suit in Kenton circuit court, at Independence, Ky., and that at the time of the institution of such suit, to wit, in the month of Sept., 1893, he was and continuously ever since has been and still is a resident and citizen of the State of Kentucky.

Affiant further saith not.

WILLIAM D. BOYER.

60 Subscribed in my presence and sworn to before me this 19th day of Dec., 1894.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'Y CO.

STATE OF ——,
County of ——, } *ss:*

E. W. Fitzgerald, being by me first duly sworn, says that he is well acquainted with Edward Hickey, who was sued as a defendant in the above-entitled case in the suit instituted in Kenton circuit court, at Independence, Ky., about the month of Sept., 1893; that he knows the residence and citizenship of the said Edward Hickey, and that the said Edward Hickey was at such time and ever since continuously has been and still is a resident and citizen of the State of Kentucky.

And further affiant sayeth not.

E. W. FITZGERALD.

Subscribed in my presence and sworn to before me this 19th day of December, 1894.

L. T. STEWARTS,
Notary Public, Hamilton Co., Ohio.

61 And on a day following, to wit, on January 2, 1895, came the plaintiff, by his attorney, and filed answer to petition for removal and amendment thereto; said answer was and is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

For answer to the petition for removal herein and the amendment thereto plaintiff Powers denies that the defendants Boyer and Hickey oe either of them were fraudulently or impreoperly joined as defendants, and denies that said Boyer and Hickey or either of them was joined as defendants for the sole puepose of defeating the alleged right of the Chesapeake & Ohio Railway Company to remove this cause to the United States circuit court. He denies that on the former application to remove this cause the same was remanded solely or at all because of said alleged fraudulent or improper joinder. He denies that at the institution of this action or

at any time since the defendant Hickey was or has been either a citizen or resident of the State of Kentucky or of the city of Covington.

62 He denies that the joinder of said Boyer and Hickey or either of them was for the sole purpose or for the purpose of defeating the jurisdiction of the United States court. He denies that the joinder of either said Boyer or Hickey was fraudulent or improper. He denies that he is in anywise estopped from asserting that the petition for removal was not filed within the time required by law for the filing of a petition for removal, and denies that this cause is now rightfully pending in the circuit court of the United States. He denies that either inadvertently or by mistake the draftsman of the petition for removal wrote in said petition the name of David Evans when it was intended to write the name of William D. Boyer.

WM. GOEBEL,
Att'y for Plaintiff.

And on a day following, to wit, January 7th, 1895, came the defendant The Chesapeake & Ohio Railway Company and filed a certain exhibit herein; said exhibit was and is in words and figures following, to wit:

Proceedings in the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at a regular May term begun and held at the Federal Court hall, in the city of Covington, on Monday, May 8th, A. D. 1893.

Court met.
Present: Hon. Wm. H. Taft, circuit judge.

63 JOHN T. POWERS
vs.
CHESAPEAKE & OHIO RAILWAY Co. *et al.* } 1834.

Be it remembered that on the 6th day of May, 1893, came the defendants, by their attorneys, and lodged in the clerk's office of this court a transcript of the record and proceedings had in the above case in the Kenton circuit court.

Afterwards, to wit, on the 8th day of May, 1893, the following entry was made herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

This day came the defendant The C. & O. R'y Co., by Messrs. Hallam & Myers, of counsel, and on its motion it is ordered that the transcript of the proceedings had in this case in the Kenton circuit court heretofore lodged in the clerk's office be, and the same is, now filed. On like motion of the defendant, by counsel, it is

ordered that the answer heretofore filed herein be, and the same is, now noted of record. Came again the defendant and filed a motion and moved the court to require the plaintiff to make a deposit or execute a bond for costs herein, as required by the rules of this court.

The transcript referred to in the foregoing order was and is as follows, viz:

64 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the circuit court in and for the county of Kenton, in said State, at the court-house, in the city of Covington, on the 2nd day of May, 1893.

Hon. Geo. G. Perkins, judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Ordinary. No. 900.

Be it remembered that heretofore, to wit, on the 14th day of April, 1893, the said plaintiff filed in the said Kenton circuit court, at Independence, in said State, the following petition:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition.

The defendant The Chesapeake & Ohio Railway Company is and at the times hereinafter stated was a corporation duly organized under the laws of the State of Virginia, and now owns and operates and at the times hereinafter stated owned and operated a line of railway extending into the county of Kenton, with the locomotive engines, cars, and other appurtenances thereunto belonging.

65 Said defendant is and at the times hereinafter stated was a common carrier whose lines extended into Kenton county. The defendant Evans resides in Kenton county. On the — day of ——, 18—, plaintiff was the servant of the corporate defendant, employed by it as a switchman and one of the crew of said defendant's switching engine numbered twenty-two (22). On said day, and while he was so in the service of the *service of the* corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a swotch of said defendant's said railway and to put a car on a side track of said defendant's said railway; and thereupon plaintiff did then and there, in said yard of the said corporate defendant, attempt to execute said order and direction of said defendant, and while plaintiff was then and there so at work executing said order and direction of the corporate defendant both of the

defendants did with gross and wanton negligence run and operate the corporate defendant's locomotive engine number fifty-six (56) and tender attached thereto against, upon, and over plaintiff, and thereby his right arm between the elbow and wrist was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise seriously and permanently injured in his person. Defendants then and there with gross and wanton negligence had no light or other warning signal on said tender. Said locomotive engine and tender were then and there run and operated by the defendants backwards, with the tender in front of the locomotive engine and nearest to the plaintiff, and the defendants with gross and wanton negligence gave no signal or warning of
66 of any kind of the moving or approach of said tender or locomotive engine, nor did they have any person on the lookout or to give any signal or warning thereof. In the committing of the wrongs aforesaid the defendant Evans was the agent and servant of his codefendant, and he at the time and place of the committing of the said wrongs had charge, direction, and control of said locomotive engine number fifty-six and the tender attached thereto. By his said injuries plaintiff was made and long continued ill; he suffered and long will continue to suffer great mental and physical pain and anguish, and he is thereby made a helpless cripple, unable to work at his vocation or any other or to earn a livelihood by — his said injuries so inflicted upon him by the said defendants. Plaintiff had been damaged in the sum of twenty-five thousand ($25,000) dollars, for which and for costs he prays judgment.

WM. GOEBEL,
For Plaintiff.

Thereupon, on the same day, April 14th, 1893, a summons and two copies in the usual form were issued; which summons does not appear among the papers.

At a session of said circuit court, at Covington, on the first day of May, 1893, the following order was made and entered of record:

"The defendants each file a petition and tender a bond for removal of this case to the circuit court of the United States, and the plaintiff objects."

The said petitions and bonds for removal are as follows:

67 Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition for Removal.

Now comes your petitioner The Chesapeake & Ohio Railway Company and states that the above suit was begun against your petitioner and one David Evans in the Kenton circuit court, at Independence, by filing a petition and issuing a summons on the 14th day of April, 1893, and defendants are not -or is either of them re-

quired by the laws of Kentucky or by the rule of this court to answer or plead unto said complaint before the 4th day of May, 1893.

That your petitioner has not yet filed answer, and that as to your petitioner said cause is now pending; that at the time said suit was begun and at the present time the plaintiff was and continuously since has been and still is a citizen and resident of the State of Kentucky, and the defendants, The C. & O. R'y Co. and David Evans, were and continuously since have been and are citizens and residents of the State of Virginia.

That the matter in dispute in said suit and for which the suit was brought exceeds the sum of $2,000, exclusive of interest and costs.

That said suit is an action to recover against defendants the
68 sum of $25,000 for damages alleged to have been sustained by said plaintiff in having his right arm cut off by reason of gross and wanton negligence of said defendants in the operation of a certain locomotive engine known as engine No. 56, belonging to said defendant, The C. & O. R'y Co., and operated by the said defendant and David Evans as its agent.

That in said suit there is a controversy which is wholly between said plaintiff and said defendant, The C. & O. R'y Co., citizens as aforesaid of different States, and which said controversy can be fully determined as between them, and that said Evans has been by the plaintiff fraudulently joined with this petitioner as a defendant to prevent the removal of this cause to the United States circuit court for the district of Kentucky.

That the defendant The C. & O. R'y Co. hereby offers F. A. Prague, of the city of Covington and county of Kenton, as surety for its entering into the circuit court of the United States for the district wherein said suit is pending, on the first day of the next session of said court or before, a copy of the record in said suit, and for paying all costs that are awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for this petitioner appearing and entering special bail in said suit if special bail was ordinar-y requisite therein.

Wherefore defendants pray this honorable court that the cause
be removed into the circuit court of the United States for the
69 district of Kentucky, and that this court proceed no further in the premises except to grant said order of removal.

HALLAM & MYERS,
W. H. JACKSON,
For Petitioner.

STATE OF KENTUCKY, }
Kenton County, } *sct:*

Chas. F. Firth says that he is the freight agent of the said defendant, The Chesapeake & Ohio Railway Company, at Covington, the station nearest the county-seat of Kenton county, and that there is no chief officer of said company in said county, and that he has read the foregoing petition and knows the contents thereof, and that the same is true.

C. F. FIRTH.

Subscribed and sworn to before me by Chas. F. Firth this 29th day of April. 1893.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO. and DAVID EVANS, Defendants. } Bond.

Know all men by these presents that the Chesapeake & Ohio Railway Company, a citizen and resident of the State of Virginia, as principal, and F. A. Prague, of the city of Covington, Ky.,
70 as surety, are jointly and severally held and firmly bound unto John T. Powers in the sum of $2,000; for which, well and truly to be paid unto the said John T. Powers, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Signed and dated this first day of May, 1893.

The condition of this bond is such that if the said Chesapeake & Ohio Railway Company, defendant in the above-entitled case, shall enter into the circuit court of the United States for the district of Kentucky, on the first day of the next session thereof or before, copy of the record in said suit and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said suit if special bail shall be requisite herein, then said obligation to be void and of no effect, and otherwise to remain in full force and virtue of law.

In witness whereof said obligators hereunto set their hands and seals this first day of May, 1893.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition for Removal.

71 Now comes your petitioner, David Evans, and states that the above suit was begun against your petitioner and the Chesapeake & Ohio Railway Co. in the Kenton circuit court, at Independence, by filing a petition and issuing summons on the 14th day of April, 1893, and defendants are not nor is either of them required by the laws of Kentucky or the rule of this court to answer or plead unto said complaint before the 4th day of May, 1893.

That your petitioner has not yet filed answer, and that as to your petitioner said cause is pending; that at the time said suit was begun and at the present time the plaintiff was and continuously since has been and still is a citizen and resident of the State of Kentucky and the defendants, The C. & O. R'y Co. and David Evans, were and continuously since have been and are citizens and residents of the State of Virginia.

That the matter in dispute in said suit and for which said suit was brought exceeds the sum of $2,000, exclusive of interest and costs.

That said suit is an action to recover against defendants the sum of twenty-five thousand ($25,000) dollars for damages alleged to have been sustained by the plaintiff in having his right arm cut off by reason of the gross and wanton negligence of said defendants in the operation of a certain locomotive engine known as engine No. 56, belonging to said defendant, The Chesapeake & Ohio Railway Company, and operated by the said defendant, David Evans, as its agent; that in said suit there is a controversy which is wholly between the plaintiff and the defendant David Evans, citizens,
72 as aforesaid, of different States, and which said controversy can be fully determined as between them.

That the defendant David Evans hereby offers F. A. Prague, of the city of Covington and county of Kenton, as surety for his entering into the circuit court of the United States for the district of Kentucky, on the first day of the next session of said court or before, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for this petitioner appearing and entering special bail in said suit if special bail was ordinarily requisite therein.

Wherefore defendant prays this honorable court that this cause be removed to the circuit court of the United States for the district of Kentucky, and that this court proceed no further in the premises except to grant this order of removal.

HALLAM & MYERS,
W. H. JACKSON,
Att'ys for Petitioner.

STATE OF KENTUCKY, }
Kenton County, } *sct:*

David Evans says that he is one of the defendants in the above-entitled cause, and that the statements of the foregoing petition are true.

DAVID EVANS.

Subscribed and sworn to before me this 26th day of April, 1893.
JENNIE M. MAHON,
Notary Public, Kenton County, Ky.

73 Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Bond.

Know all men by these presents that David Evans, a citizen and resident of the State of Virginia, as principal, and F. A. Prague, of the city of Covington, Ky., as surety, are jointly and severally held and firmly bound unto John T. Powers in the sum of $2,000; for which, well and truly to be paid to said John T. Powers, his heirs, executors, administrators, and assigns, — firmly by these presents.

Signed and dated this 1st day of May, 1893.

The condition of this bond is such that if the said David Evans, defendant in the above-entitled cause, shall enter into the circuit court of the United States for the district of Kentucky, on the first day of the next session thereof or before, a copy of the record of this suit, and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in this suit if special bail is requisite herein, then said obligation to be void and of no effect; otherwise to remain in full force and virtue of law.

In witness whereof said obligators hereunto set their hands and seals this first day of May, 1893.

74 DAVID EVANS.
F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

At a session of said circuit court, at Covington, on the 2nd day of May, 1893, the following order was made and entered of record: "The bonds for removal are approved."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said circuit court, certify that this and the preceding 10 pages contain a complete and true transcript of the record in the case named in the caption.

H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

The answer of the C. & O. R'y Co., filed May 6th, 1893, is as follows:

United States Circuit Court, District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO R'Y Co. and DAVID EVANS, Defendants.

Answer of C. & O. R'y Co.

For its separate answer to plaintiff's petition in this action defendant The Chesapeake & Ohio Railway Company denies that it did with gross and wanton negligence or in any manner run or operate any locomotive engine or tender, or either, upon or over the plaintiff, or that with gross and wanton or any negligence or in any manner it had no light or warning signal on said tender, or that any locomotive engine or tender was by it run or operated backwards or with the tender in front of the locomotive
75 engine or nearest the plaintiff, or that it with gross and wanton or with any negligence or in any manner gave no signal or warning of the moving or approach of a locomotive engine and tender or either, or that it did not have any person on the lookout or to give signal or warning, or that it in any manner inflicted on the plaintiff any of the wrongs or injuries by him complained of, but this defendant says the said negligence, wrongs, and injuries, if done or *af*flicted at all, were each and all done and inflicted by its codefendant, David Evans, and that said David Evans was then and there the feollow-servant of the plaintiff in the same line of this defendant's employment, and that the said alleged negligences, wrongs, and injuries were alone the negligences, wrongs, and injuries of the said David Evans.

Wherefore this defendant prays judgment that it be hence dismissed with its costs.

HALLAM & MYERS,
W. H. JACKSON,
Att'ys for C. & O. R'y Co.

THE STATE OF KENTUCKY, *Kenton County,* } *sct:*

Chas. F. Firth says that he is the freight agent of the said defendant, The Chesapeake & Ohio Railway Company, at Covington, the station nearest the county-seat of Kenton county, and that there is no chief officer of said company in said county, and that he has read the foregoing answer and believes the statements therein contained are true.

C. F. FIRTH.

Subscribed and sworn to before me by said Chas. F. Firth this 6th day of May, 1893.

J. M. MAHON,
Notary Public, Kenton County, Ky.

76 On a day following, to wit, May 9th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

On motion of defendant for a deposit or bond for costs, it is ordered that plaintiff have sixty days in which to make such deposit or give such bond as is in that behalf required by the rules of the court.

And on the same day, May 9th, 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

This day came the plaintiff, by Wm. Goebel, Esq., of counsel, and moved to remand this cause to the State court for further proceedings therein; came also the said plaintiff, by his counsel, and filed his answer to the defendant's petition for removal. The court takes times. It is ordered that this case be, and same is, now set at the foot of the trial docket, and is set for hearing the 9th day of the term.

Answer of the plaintiff to the petition of removal of David Evans is as follows, viz:

77 United States Circuit Court, District of Kentucky.

JOHN T. POWERS
vs.
THE C. & O. R'Y Co.

For answer to the petition for removal of defendant David Evans the plaintiff, John T. Powers, denies that at the time this suit was begun or at any time since this suit was begun or at the present time he, the plaintiff, was or is a citizen or a resident of the State of Kentucky or of any State other than the State of Virginia. He denies that at the time this suit was begun or at any time or at the present time the petitioner David Evans was or is a citizen or resident of the State of Virginia or a citizen of any other State than the State of Kentucky. He denies that in said suit is a controversy which is wholly between said plaintiff, Powers, and said defendant, Evans, and which can be fully determined between them.

He therefore prays that this action be remanded to the Kenton circuit court.

WM. GOEBEL,
Att'y for Plaintiff.

Plaintiff's answer to petition for removal of the C. & O. R'y Co. is as follows, viz:

78 United States Circuit Court, District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., &c., Defendants.

For answer to the petition for removal herein filed by the defendant The C. & O. R'y Co. the plaintiff denies that at the time this suit was begun or at any time since this suit was begun or at the present time he, the plaintiff, was or is a citizen or a resident of the State of Kentucky. He denies that for a long time before the beginning of this suit continuously until the bringing of this suit and to the present time he was or is either a citizen or resident of any other State than the State of Virginia. He denies that at the time this suit was begun or at any time since or now the defendant David Evans is or was either a citizen or resident of the State of Virginia or of any State other than Kentucky. He denies that in this case there is a controversy between citizens of different States which can be fully determined between them. He denies that said Evans was fraudulently joined with the petitioner The C. & O. R'y Co. to prevent the removal of this cause to the United States circuit court for the district of Kentucky.

The plaintiff prays this action be remanded to the Kenton circuit court and for all other proper relief.

WM. GOEBEL,
Att'y for Plaintiff.

79 On May 10th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

This cause coming on to be heard upon the motion of plaintiff to remand this cause to the State court for further proceedings herein, came also the defendant, by Hallam and Myers, its attorneys; whereupon argument was heard on said motion, and the court, not being advised, takes time, and said motion is submitted.

On May 11th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

This cause coming on to be heard on the motion of plaintiff to remand this cause to the State court for further proceedings herein, and the court being now advised, it is ordered that said motion be, and same is, overruled.

Interrogatories of defendant filed May 16th, 1893, are as follows, viz:

80 United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS.

Interrogatories to be Propounded to George E. Evans, to be Read as Evidence on Behalf of the Defendants in the Trial of the Above Case.

Int. 1. Where do you reside?
Int. 2. What is the State of your residence?
Int. 3. How long have you lived in that State?
Int. 4. In what way are you connected with the defendant David Evans?
Int. 5. Of what State is David Evans a citizen?
Int. 6. What blood relations has the defendant David Evans living in Virginia?
Int. 7. Has he any blood relations living in the State of Kentucky?

HALLAM & MYERS,
Att'ys for Def't.

United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. and DAVID EVANS, Defendants. } Interrogatories.

81 *Interrogatories to be Propounded to Richard Evans, to be Read as Evidence on Behalf of the Defendants in the Trial of the above Cause.*

Int. 1. Where do you reside?
Int. 2. What is your State of residence?
Int. 3. How long have you lived in that State?
Int. 4. In what way are you connected with the defendant David Evans?
Int. 5. Of what State is David Evans a citizen and resident?
Int. 6. What blood relations has the defendant David Evans living in Virginia?
Int. 7. Has he any blood relations living in the State of Kentucky?

HALLAM & MYERS,
Att'ys for Def't.

On May 17th, A. D. 1893, an order was entered herein which was and is as follows, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

On motion of plaintiff, by his counsel, Hon. Wm. Goebel, it is ordered that this action be and same is discontinued at the cost of plaintiff, without prejudice to another action.

82 UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

I, Joseph C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing 16 pages, this included, contain a true and correct transcript of the record and proceedings had in the case set out in the caption hereto as same now appears from the records and files of this office.

Witness my hand and the seal of said circuit court, at Covington, this 12th day of June, A. D. 1894, and of our Independence the 118th year.

JOSEPH C. FINNELL, *Clerk,*
By F. D. COCHRAN, *D. C.*

And on a day following, to wit, February 12th, 1896, a *nunc pro tunc* order was made and entered herein; said order was and is in words and figures as follows, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

83 It appearing to the court that the following order made by the court on January 7, 1895, has by clerical error been omitted from the journals of the court, said error is now entered as of said date, to wit:

This cause, coming on to be heard upon the motion of plaintiff to remand the cause to the Kenton circuit court, having been argued by counsel, is now overruled and the bond tendered by the defendant is approved; to all of which the plaintiff excepts. Court filed opinion.

The opinion referred to in the foregoing entry was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Before Taft and Barr, JJ.

This is a motion to remand a cause from the circuit court of Kenton county, Kentucky. On April 14th, 1893, the plaintiff Powers,

a citizen of Kentucky, filed his petition in the Kenton circuit court against the Chesapeake & Ohio Railway Company and David T. Evans, alleging that the defendant railway company was a citizen of Virginia, and that Evans was a citizen of Kenton county, Kentucky, and that both defendants were jointly guilty of negli-
84 gence in the operation of a train on the Chesapeake & Ohio railroad which resulted in severe injuries to the plaintiff, for which he asked damages against both in the sum of $25,000.00. On April 29th, before an answer was required to be filed under the laws and practice of Kentucky, each defendant filed a petition to remove the cause to this court on the ground that both defendants were citizens of Virginia, while the plaintiff was a citizen of Kentucky. The plaintiff, by answer to the petition for removal, raised an issue of fact as to the citizenship of Evans, alleging that he was a citizen of Kentucky, and moved to remand the case. This court found that Evans was a citizen of Virginia and denied the motion. The plaintiff thereupon, on May 17th, 1893, dismissed his action in this court and filed a new petition on the same cause of action in the Kenton circuit court, in which he made defendants not only the Chesapeake & Ohio Railway Company and Evans, but also William D. Boyer and Edward Hickey. The petition alleged that the plaintiff was a switchman in the employ of the Chesapeake & Ohio Railway Company; that while engaged in throwing a switch at night he was run down by an engine of the company and severely injured; that the engine was running backwards, drawing a caboose, and that the accident occurred and that the injuries were inflicted because of the joint gross and wanton negligence of the railway company and Boyer, the conductor; Evans, the engineer, and Hickey, the fireman, the last three of whom had posses-
85 sion, direction, and control of the engine and caboose as agents of the company. Damages were asked in the sum of $25,000.00. Before its answer was required by the law of Kentucky to be filed the Chesapeake & Ohio railway filed a petition for removal to this court, which, after generally describing the suit and the amount involved, proceeded as follows:

"That there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the States of Virginia and West Virginia and of no other States, and that it was then and there and still is a resident and citizen of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the said Wm. D. Boyer, David Evans, and Edward Hickey are fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of petitioner to remove to the United States circuit court."

Bond was given and the cause removed.

Plaintiff answered the petition for removal in this court, denied that the controversy was wholly between citizens of different States, and denied that the three defendants, Boyer, Evans, and Hickey, had been fraudulently or improperly joined to defeat the codefendant's "pretended right of removal."

It being admitted that Boyer and Hickey were citizens of Kentucky, this court granted the motion to remand, holding that as plaintiff's petition stated a good cause of action against Boyer,
86 Evans, and Hickey the plaintiff had the right to unite them as defendants with the railway company, even if it was done with the intention of defeating the jurisdiction of the Federal court; that when a tort was committed by several the injured person had an election to sue one or all, and the motion for the election could not be made a ground for treating as a separable cause of action against a single defendant that which the plaintiff had chosen to treat as a joint one; that in a Federal court the petition as against the Chesapeake & Ohio Railway Company was probably demurrable, but it was not so against the other defendants, and because a removing defendant had a good defense in law or fact to a joint action it did not thereby become, with respect to such defendant, a separable controversy.

The cause proceeded to issue in the State court, and on October 16th, 1894, the plaintiff discontinued his cause as to all the defendants except the Chesapeake & Ohio Railway Company. The defendant at once filed a petition for removal to this court and tendered a bond. The plaintiff objected, and the court denied the petition and declined to approve the bond, "but not for lack of sufficiency thereof." The cause then proceeded in the State court to trial, verdict, and judgment for plaintiff in the sum of $10,000 00.

The defendant filed the transcript of the proceedings in this court before the first day of this term, the next after the denial of the second petition for removal by the State court. The petition was like the first except in the following clauses:
87 "Your petitioner further says that in the bringing of this suit heretofore, on the — day of ——, 189–, David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant in the above-entitled cause for the sole purpose of defeating the right of your petitioner to remove this cause to the United States circuit court; that because of the joinder of the said Evans and Hickey said cause was remanded to the State court. Your petitioner says that the suit as to said Evans and Hickey was on the 16th day of October, 1894, dismissed; that the said cause is now for the first time pending as — the Chesapeake & Ohio Railway Company alone."

Plaintiff filed an answer to the petition in this court and a motion to remand. The answer denies that the defendants other than the Chesapeake & Ohio Railway Company were fraudulently or improperly joined to defeat the latter's alleged right of removal.

In support of the petition for removal the defendant has filed the affidavits of Evans and Boyer, stating that the discontinuance as to

them was made by plaintiff without consideration moving from them and without their request or knowledge. The record shows that Hickey was never served with summons.

TAFT, *Circuit Judge:*

88 A plaintiff has a joint and several cause of action against a citizen of another State and citizens of his own State. He joins them in a single action in the State court for the sole purpose of preventing removal by the non-resident to the Federal court. After the statutory time for removal has passed and the joinder of the resident defendants has, as he thinks, effected his purpose, the plaintiff discontinues the case as to all but the non-resident defendant. Does this conduct estop the plaintiff from making the objection that the petition for removal filed immediately after the discontinuance is too late? This is the question which the defendant seeks to raise, and we must first determine whether it is squarely presented for our decision.

The circumstances shown by this record leave no doubt that the purpose of the plaintiff in the joining of Evans, Boyer, and Hickey as defendants was to defeat the railway company's right to remove the cause. In the first suit Evans, the fireman, was made codefendant with the company. When it was found that his citizenship was not such as to defeat removal, the suit was dismissed and a new one brought, with the engineer and conductor as additional defendants. They were shown to be citizens of Kentucky, and thereby the removal of the new case was defeated. Just before the trial, without request or knowledge on their part, the defendants, except the company, were dismissed. Counsel seek to explain the dismissal

89 on the ground that Hickey, one of the defendants, had not been served with summons, and that the presence of the others as parties defendant was made the basis of an unfounded claim that the trial should be transferred from Independence to Covington. The record does not show that either of the defendants Boyer or Evans moved to transfer or that their presence in the case made the transfer necessary. Even if it did so appear, the explanation is insufficient. It is a virtual confession that they were not joined in good faith to obtain judgment against them. Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover $25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employé, and when a cause is dismissed in the Federal court, in order to make such employés parties to a new suit, and after fear of removal is passed they are then dismissed, the inference as to the purpose of their joinder is too plain to need much discussion. In Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed. Rep., 165, Judge Lurton made a similar inference from an analogous though not the same state of facts.

But it is said that the petition for removal is defective, in that it does not aver that Boyer was fraudulently joined as a defendant and subsequently dismissed.

The petition for removal stated the necessary jurisdictional
90 facts, namely, the diverse citizenship, the jurisdiction- amount, and averred that removal within statutory time had been prevented by fraud of plaintiff. It is true that in mentioning the names of the defendants who were alleged to have been joined fraudulently in order to defeat the jurisdiction of the Federal court and to have been dismissed after serving this purpose, Boyer was by an evident mistake omitted, but this was merely an omission to state all the evidential facts on which the claim of fraudulent estoppel was based, but it did not destroy the legal sufficiency of the petition to show an estoppel. It is settled beyond controversy that it is not for the State courts to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when as a matter of law on the face of the petition and the facts disclosed by the record the right does not exist. Kansas City, Ft. Scott & Memphis R. R. Company *vs.* Daughtry, 138 U. S., 298; Crehore *vs.* Ohio & Mississippi Railway Company, 131 U. S., 240; Burlington, Cedar Rapids, etc., Railway *vs.* Dunn, 122 U. S., 513; Carson *vs.* Hyatt, 118 U. S., 279.

An examination of the record in this case would have shown the joinder of Evans, Hickey, and Boyer, the averment in the first petition for removal that they had all been fraudulently joined to defeat removal, and their subsequent dismissal from the case. This is a case, therefore, where an amendment to the petition for removal can be permitted in this court to state more fully and exactly all
91 the facts upon which the removal was prayed, because the ultimate jurisdictional facts are correctly stated and the detailed facts concerning the fraud, though imperfectly stated in the petition for removal, all appear in the record. Carson *vs.* Dunham, 121 U. S., 421, 427; Ayers *vs.* Watson, 113 U. S., 594, 598; Crehove *vs.* Ohio & Mississippi R. R. Co., 131 U. S., 240; Jackson *vs.* Allen, 132 U. S., 27; Martin's A'm'r *vs.* Baltimore & Ohio R. R., 151 U. S., 673–691. It is true, also, that there is in the petition no direct statement that the reason why the joinder of Hickey and Boyer defeated the jurisdiction of the Federal court was because they were citizens of the same State as the plaintiff, though this is a necessary inference from the averments made; but it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the State court, that it was then admitted by both plaintiff and defendant that Boyer & Hickey were citizens of Kentucky, and that for this reason the motion to remand was granted. Defendant has been given leave to amend its petition for removal to restate the facts as above suggested and an amended petition has been filed.

On the whole, therefore, we conclude that the question is fairly before us whether the joinder by the plaintiff in a State court of resident defendants, against whom a good cause of action is stated, solely to prevent removal by a non-resident defendant, and
92 the subsequent dismissal of such resident defendants from the case, leaving the suit against the non-resident alone, estops plaintiff to plead the time of limitation against removal.

The question is a new one, but we think its answer is not difficult in view of the ruling of the Supreme Court of the United States in analogous cases. It has long been held that the joinder of a sham defendant to defeat the jurisdiction of the Federal court could not prevent removal, but those cases were where, on the face of the declaration of the plaintiff, no cause of action was stated against the defendants whose joinder was charged to be fraudulent. Arapahoe County *vs.* Kansas Pacific R'y Co., 4 Dill., 277; Federal Cases, 502, and Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed Rep., 165. Here in plaintiff's petition a good cause of action was stated against the defendants alleged to have been fraudulently joined, and if the cause had proceeded to judgment against or in favor of these defendants no removal could have been had at any stage of the case. This court has already decided in this case that the motive a plaintiff has in suing defendants against whom he can state a good cause of action cannot affect the question of removing the case to the Federal court as long as they remain parties to the cause. We see no reason now to question that conclusion.

But the motive of plaintiff in joining such defendants does
93 become material if he subsequently dismisses them and makes the case, before the final trial, one which would have been removable had it not been thus originally brought. If the court can gather from the circumstances that the joinder and subsequent dismissal of the other defendants was a mere device to defeat a removal by the non-resident defendant within the statutory time and with no purpose of ever pushing the case to judgment against the others we are very clear that the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud brought about, and that he must be estopped to use that delay as an objection.

It has been several times decided by the Supreme Court that the time for removing the case fixed by the statute is not indispensable to the jurisdiction of the Federal court, but that it may be waived by the consent and acquiescence of the parties, and that a party may be estopped by his conduct to allege it as an objection to removal.

In Ayres *vs.* Watson, 113 U. S., 595, a defendant filed his petition for removal to the Federal court after the time had elapsed within which the statute required it to be filed. The cause was removed and resulted in a judgment against the defendant, who, on appeal, sought to reverse the judgment on the ground that the circuit court was without jurisdiction, because the petition for removal was not filed in time. The Supreme Court held that as the party objecting had himself removed the case he was estopped to make such
94 an objection. This was under the removal act of 1875, but, though the time for removal is changed, this question is not different under the acts of 1887 and 1888. We quote in full the language of Mr. Justice Bradley upon the point:

"By section 2 of the act of 1875 any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dis-

pute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which The United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign State, citizens of subjects, either party may remove said suit into the circuit court of the United States for the proper district, and when in any such suit there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district. This is the fundamental section based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By section 3 it is provided that a petition must be filed in the State cou[illegible] before or at the time at which the cause can be first tried and b[illegible]re the trial thereof, for the removal of the suit into the circuit [illegible]rt, and with such petition a bond, with condition, as prescribed [illegible] the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties or some other jurisdictional fact prescribed by the second section is absolutely essential and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. Mansfield & Coldwater Railway Co. *vs.* Swan, 111 U. S., 579. Application in due time and the proffer of a proper bond, as required in the third section, are also essential, if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond or any information
95 in it or any informalities in the petition, provided it states the jurisdictional facts, and if these are not properly stated there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, it seems to us, there os no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing. It is not in its nature a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and, no doubt, cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it, and, since the removal was affected at the instance of the party who now makes the objection, we think that he is estopped. In Railroad Co. *vs.* Knootz, 104 U. S., 5, 17, we held that

where the State court disregarded a petition for removal properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the *the* delay of the defendant in entering the cause in the circuit court of the United States until the decision of the State court is reversed."

Ayres *vs.* Watson has lately been reviewed by Mr. Justice Gray, speaking for the Supreme Court, in Martin's Administrator *vs.* The Baltimore & Ohio R. R. Company, 151 U. S., 673. In that case it was held that an objection that a petition for removal was not filed in time under the acts of 1887 and 1888 was waived if not taken before the trial in the circuit court. Ayres *vs.* Watson, *supra*, and French *vs.* Hay, 22 Wallace, 238, are cited in support of this conclusion. After quoting at some length from Mr. Justice Bradley's opinion in the former case, Mr. Justice Gray says: "His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and estoppel alike."

96 The decision in Ayres *vs.* Watson as to the waiver in the circuit court of the United States of the objection that the petition for removal had not been seasonable filed in the State court has never been doubted or qualified. Pages 690 and 691.

The circuit court of appeals of this circuit has applied the same principle in Newman *vs.* Schwerin, 61 Fed. Rep., 865, and the circuit court of appeals in the fifth circuit in the case of Knight *vs.* The Railway, 61 Fed. Rep., 87.

The nearest approach to an authority for the case at bar is to be found in language of the present Chief Justice in the case of Northern Pacific Railway Company *vs.* Austin, 135 U. S., 315, 318. In that case a plaintiff brought suit for $475, making a controversy involving less than $500, which was then the minimum limit of the jurisdiction of the United States circuit courts, and thus prevented removal. After the jury was impanelled in the State court and the trial begun, the trial court, against defendant's objection and exception, permitted an amendment increasing the amount claimed in the *ad damnum* clause to $1,000. Verdict and judgment of $750 were rendered, and on a writ of error the case was brought to the Supreme Court of the United States. The error alleged was in permitting the amendment. The court held that the only way by which the defendant could protect himself against the action of the court in allowing the amendment was by at once filing a petition for removal, and that, not having done so, no right secured

97 by a statute or the Constitution of the United States had been denied him, and the action of the court in permitting the amendment was not, therefore, reviewable by the Supreme Court of the United States. After reaching this conclusion the Chief Justice continued:

"If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought 'before or at the term at which such cause could be first tried and

before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal—Ayres *vs.* Watson, 113 U. S., 594, 598—it may, though obligatory to a certain extent, be waived; and as where a removal is effected the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him. If, on the other hand, the motives of the plaintiff could not be inquired into or, if admitted, would not effect the result, as in most cases of remittitur—Thompson *vs.* Butler, 95 U. S., 694; Pacific Postal Telegraph Co. *vs.* O'Connor, 128 U. S., 394—the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the court in regard to it. The only importance it has is in its bearing upon the charge of bad faith in respect to the right of removal, and that question cannot properly arise in the absence of an application to remove."

Now, it may be admitted that this language was not necessary to the decision of the case, and that it was not in the form of a positive statement of law, but is rather only an intimation of a possible or probable conclusion which the court would reach were a case of the kind suggested presented for its decision. Nevertheless the conclusion intimated is such a necessary sequence from the reasoning of the court in Ayres *vs.* Watson, *supra*, in Martin *vs.*
98 Baltimore & Ohio T. R., *supra*, and in French *vs.* Hay, *supra*, that we have no difficulty in applying to in the case at bar. It is sought to distinguish Austin's case from the one at bar on the ground that the amendment in that case changed the cause of action, while here the cause of action remained the same and was not changed by the dismissal of the resident defendants. The distinction is untenable. The cause of action in Austin's case was the same after the amendment as before. The maximum limit of recovery was increased by the amendment; that was all. In the case at bar, that which had been declared on as a joint tort was changed by the plaintiff voluntarily into a several liability. In each case, though the cause of action remained the same, the plaintiff so changed its form as to bring it within the jurisdiction of the Federal court. In each the first form of action was evidently adopted as a device to prevent removal seasonably under the statute with intent to restore the cause of action to a removable form when the statutory time had elapsed. The cases are quite parallel and the estoppel is as plain in the one as in the other.

In the Austin case it was not the reduction of the amount claimed below five hundred dollars with intent to defeat removal which made the case removable, but it was the reduction with such a purpose, accompanied by a subsequent charge of the form of the
99 action so as to bring it within the removal jurisdiction of the Federal court. Had the plaintiff never amended the case

would never have been removable, however plain the intent of the plaintiff to defeat removal by limiting his own recovery. He would have the right to defeat removal in this way by giving up part of his claim.

So, in the case at bar, had the plaintiff retained the resident defendants as parties until the judgment, however clear it was that his intent in so doing was to defeat removal, the case could not have been removed because in his petition he stated a good cause of action against the defendants so joined; but when he dismissed the resident defendants he made a removable case, and the palpable device adopted to prevent an earlier removal disables him from pleading the time limitation. On the other hand, if the plaintiff, in good faith and not for the purpose of defeating the Federal jurisdiction, unites defendants resident and non-resident in a single joint cause of action, and before trial is had and judgment rendered the resident defendants are dismissed from the case by the court or otherwise, leaving a controversy between the plaintiff and non-resident defendants within the removal jurisdiction of the Federal court, except that the time for removal is past, the case cannot be removed against the plaintiff's objection, for he is not estopped to plead the time limitation which begins to run from the beginning
100 of a suit and not from the time when the case assumes the form of a removable controversy.

A case like the one at bar is not to be confused with cases like that of Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed. Rep., 165; and Arapahoe County *vs.* Kansas Pacific Railway Company, 4 Dill., 277; Fed. Cases, 502. In those cases the plaintiff's pleading showed that the resident defendants were merely nominal or sham defendants, because no cause of action was stated against them in the one case, and no relief was asked against them in the other. In such a case of course the petition for removal must be filed within the statutory time, or the right is lost. The joinder of the sham defendants does not prevent the removal and is no excuse for any delay in perfecting it; but in the case at bar the plaintiff's petition stated a good cause of action against all the defendants. Until the resident defendants were dismissed the case was not within the jurisdiction of the Federal court and the right of removal did not accrue. Hence it was necessary to file a new petition for removal after the dismissal, because then for the first time the controversy was one — which the Federal court could take cognizance.

If this distinction is borne in mind, the case of Kansas City, Ft. Scott and Memphis Railroad Company *vs.* Daughtry, 138 U. S., 298, will be found to have nothing in it to conflict with our con-
101 clusion here. In that case the plaintiff brought suit in a State court of Tennessee against the Kansas City, Fort Scott and Memphis Railroad Company, a citizen of Arkansas, and the Kansas City, Memphis and Birmingham — Company, a citizen of Tennessee, for the recovery of damages for the death of John W. Daughtry, alleged to have been occasioned by the negligence of the defendants. The first-named company was in default for plea to

the declaration for four terms of court, and then filed its petition for removal, averring that the jurisdictional amount was in controversy; that the plaintiff was a citizen of Tennessee; that it, the petitioner, was a citizen of Arkansas; that its codefendant was a citizen of Tennessee; that the acts alleged to have been done jointly by petitioner and its codefendant were, if done at all, done by the petitioner alone, and its codefendant did not at the time and "does not now and never did own, possess, control, or use the said railroad track upon which said acts were done, etc.; that the said Kansas City, Memphis and Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this cause to the circuit court of the United States." The plaintiff then filed an affidavit stating that he was a citizen of Arkansas, the same State as that — the petitioning defendant. The State court, on the petition and affidavit, found that the plaintiff was a citizen of Arkansas and refused to grant the petition. A few days later the
102 cause came on for trial, and the Kansas City, Memphis and Birmingham Railroad Company was dismissed by plaintiff from the case. The resulting judgment against the other company was carried to the supreme court of Tennessee, and that court affirmed the action of the court below in denying the petition for removal, on the ground that it had power to pass on the issue of fact as to the citizenship of the plaintiff. The Supreme Court of the United States, to which the case was carried on error, held that in this the Tennessee court erred, because all issues of fact were for the circuit court of the United States alone to decide, but that the action of the State court must be affirmed for the reason that, as matter of law, the petition for removal was bad because it was filed after the time for removal as limited in the statute.

In the opinion there is no reference made to the last averment in the petition for removal, that the Birmingham Company had been joined as a nominal party solely to prevent removal, and we can merely supply the obvious reason why such an averment under the circumstances did not remove the objection that the petition for removal came too late. The petition for removal was filed while the Birmingham Company was still a party defendant. The averment that it was joined to defeat removal could have been made as well within the statutory time for removal as when it was made. If the Birmingham Company was merely a nominal party defendant, and this appeared on the face of the declaration, the
103 conduct of the plaintiff did not prevent the seasonable filing of the petition for removal, and there was no room for an estoppel.

If the declaration made a good case against the Birmingham Company, it is difficult to see how the Federal court could hold it to be a nominal defendant and remove the case without trying the merits of the case, and no authority has held that this can be done. It may be truly said, therefore, of the Daughtry case that either the averment as to the joinder of the resident defendant was something which could have been made the basis for a removal within statutory

time or it made no case for removal at all as long as the resident defendant remained a party. The marked distinction between the case at bar and that of Daughtry is that in the latter case no petition for removal was filed after the dismissal of the resident defendant and the change of the cause to a removable form. In this case not only was a petition for removal filed within the statutory time, but a second petition was filed immediately after dismissal of the resident defendant.

We think the conclusion we have reached is a fair and just one. It is often within the power of a plaintiff to deprive a defendant of the right to go into the Federal court by questionable means, which a want of comprehensiveness in the statute prevents the court from defeating; but, as Mr. Justice Miller said on the circuit in the case of Arapahoe County *vs.* Kansas Pacific R'y Co. *et al.*, in speaking of
the constitutional right of persons with requisite citizenship
104 to resort to the Federal courts and the necessity of preserving it, "We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

The facts of the present case seem to us clearly to show that there was a device to deprive the Chesapeake & Ohio Railway Company of its constitutional and statutory right to come into this court, and we find no difficulty in defeating the device on principles well supported by decided cases.

The petition for removal is granted, the bond is approved, and the motion to remand is denied.

WM. H. TAFT.

I concur.
JNO. W. BARR.

And on a day following, to wit, on December 9, 1895, came plaintiff, by his attorney, and filed a plea herein; said plea was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Plaintiff says that after the presentation to the Kenton
105 circuit court by defendant, The Chesapeake & Ohio Railway Company, of its petition and bond for removal herein, October 16th, 1894, said defendant presented the question thereby raised to said State court for decision and procured the decision of said State court thereupon, which decision of said State court was against said petition and application for removal, and thereupon said defendant excepted to said decision and judgment of said State court; and thereafter said cause was tried and verdict and judgment rendered against said defendant in said State court, in which trial said de-

fendant took part, and thereupon said defendant, in said State court, filed its motion and grounds for a new trial of said cause in said State court and invoked and had the judgment of said State court thereupon, which judgment overruled said motion; and thereupon said defendant prayed said Kenton circuit court for an appeal to the court of appeals of Kentucky from said judgment against it, which appeal was thereupon granted to it by said State court; and thereafter said defendant, in prosecution of said appeal from said judgment to the court of appeals of Kentucky, did, on the 30th day of October, 1894, in said cause and in said Kenton circuit court, duly execute and give its supersedeas bond superseding said judgment in the following words and figures, namely:

Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
against
C. & O. R'W'Y Co., Defendant.

106 We undertake that the defendant, The Chesapeake & Ohio Railway Company, will pay to the plaintiff all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said court rendered October 20th, 1894, for $10,000.00, and interest and costs; also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the appellate court may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment appealed from.

Witness our hands this 30th day of October, 1894.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Said defendant in said bond gave said F. A. Prague as its surety on said bond.

And thereupon said defendant had issued upon and in prosecution of its said appeal had issued and executed a supersedeas of said judgment.

And thereafter, on the — day of ——, 1894, said defendant, in further prosecuting of its said appeal to the court of appeals of Kentucky and solely for the purpose of said appeal, presented to said Kenton circuit court its bill of evidence and exceptions of all the proceedings and rulings of said court had upon the said trial therein of said cause, and procured and had the said State
107 court to sign, approve, and file the same, and make the same part of the record of said cause; all of which was done by said State court.

Said appeal from said judgment of the Kenton circuit court to the court of appeals of Kentucky and the said supersedeas there-

upon are each still pending, undetermined, and in full force and effect.

Plaintiff pleads the foregoing facts in abatement of this cause in this court, and also pleads the same to and against the jurisdiction of this court in this cause, and he says and pleads that because thereof and because this cause was not a removable cause from said State court to this court this court has not jurisdiction of this cause.

And he prays that it may be so held and adjudged.

WM. GOEBEL, *For Plaintiff.*

And on a day following, to wit, on December 10th, 1895, the following motion to defer proceedings was filed herein, and was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Upon and for the facts and reasons set out in the plea of
108 abatement and plea to the jurisdiction of the court filed herein by the plaintiff on December 9th, 1895, the plaintiff moves the court to defer all proceedings in this cause in this court until the termination of the cause in the courts of the State of Kentucky, and in the Supreme Court of the United States, if the cause should be taken thereto from the courts of Kentucky.

WM. GOEBEL, *For Plaintiff.*

And on the same day, to wit, on December 10th, 1895, a motion to remand was filed herein by the plaintiff; said motion was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Plaintiff moves the court to remand this cause to the State court upon the grounds and facts and for the reasons set out in the plea in abatement and plea to the jurisdiction herein filed on the 9th day of December, 1895.

WM. GOEBEL,
Attorney for Plaintiff.

109 And on the same day, to wit, on December 9th, 1895, came the defendant, The Chesapeake & Ohio R'y Co., by its attorney, and filed demurrer to said plea; said demurrer was and is in words and figures as follows, to wit:

United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., Defendant.

Now comes The Chesapeake & Ohio Railway Company, defendant herein, and demurs to the plea of abatement filed by the plaintiff herein because the same does not state facts sufficient to oust the jurisdiction of this court.

SIMRALL & GALVIN,
W. H. JACKSON,
Att'ys for Def'ts.

And on a day following, to wit, on December 10th, 1895, an entry was made herein; said entry was and is in words and figures as follows, to wit:

110 JOHN T. POWERS
vs.
THE C. & O. R'W'Y CO.

This cause coming on for hearing on the plea of plaintiff in abatement and to the jurisdiction of this court and on the demurrer of defendant thereto, the court, on consideration thereof, finds said demurrer well taken and sustains same to said plea in abatement and to the jurisdiction of the court; to which ruling plaintiff, by his counsel, comes and excepts.

And thereupon, the cause coming on further to be heard upon the motion of plaintiff to defer all proceedings in this cause in this court until the termination of the cause in the courts of the State of Kentucky and the Supreme Court of the United States, if the case shall be taken thereto from the courts of Kentucky, and the defendant objecting thereto, the court, on consideration, finds said motion not well taken and overrules the same; to which ruling of the court plaintiff, by his counsel, comes and excepts.

And on the same day, to wit, on December 10th, 1895, an entry was made herein; said entry was and is in words and figures as follows, to wit:

111 JOHN T. POWERS
vs.
THE C. & O. R'W'Y CO.

This day came again the plaintiff, by his counsel, and now renews the motion herein to remand the case to the State court. Came the defendant and objected to the filing of said motion—argument being heard—and the court, being advised, is of the opinion that said motion be overruled and it is so ordered; to which ruling of the court plaintiff, by his counsel, comes and excepts.

And on a day following, to wit, on Friday, February 14th, 1896, an entry was made herein; said entry was and is in words and figures as follows, to wit:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'W'Y CO.

This cause being this day called for trial, and the plaintiff insisting upon his objection to the jurisdiction of the court, and that the court is without jurisdiction because the cause was never properly removed into this court and should have been remanded to the State court, and declining for that reason to recognize the jurisdiction of this court or to prosecute his action herein, the court overruling all of said objections, and the plaintiff still declining to proceed
112 in this court, and the court being of the opinion that *that* the petition does not state a cause of action, it is now adjudged that the action be, and the same is hereby, dismissed at the cost of the plaintiff; to all of which the plaintiff objects and excepts and files his petition for a writ of error to the Supreme Court of the United States, upon the ground alone that the cause was not properly removed into this court, and that this court is without jurisdiction. Said writ of error is allowed and the question of the jurisdiction of this court is hereby, at the plaintiff's request, certified to the Supreme Court of the United States upon the various proceedings to remove said cause into this court and to remand the same to the Kenton circuit court. Said proceedings and record upon which the question of jurisdiction is so certified to the Supreme Court of the United States upon said writ of error are as follows, to wit: Transcript from Kenton circuit court, filed herein December 4th, 1893; the answer to the petition for removal, filed by the plaintiff December 14, 1893; the amendment to the transcript from the State court, filed by the plaintiff December 14, 1893; the order of January 10th, 1894, remanding the case to the State court; the transcript from the Kenton circuit court, filed herein by the defendant December 3rd, 1894; affidavits of David T. Evans and William D. Boyer, filed by the defendant December 6, 1894; the motion to remand, filed by the
113 plaintiff December 11, 1894; the answer to the petition for removal, filed by the plaintiff December 11th, 1894; the motion for leave to file amended petition and affidavits, filed by the defendants December 22, 1894; the order made by the court December 22, 1894, granting said motion; the amended petition for removal and affidavits of E. W. Fitzgerald and W. D. Boyer, filed by the defendant December 22, 1894; the answer to the petition for removal and amendment thereto, filed by the plaintiff January 2, 1895; the exhibits, original transcript of proceedings had in case No. 1834, filed herein by the defendant January 7, 1895; the order of court made January 7, 1895, overruling a motion to remand the case December 9, 1894; the plea to the jurisdiction and the demurrer to the plea, filed December 9, 1895; the order of the court entered December 10th, 1895, sustaining the demurrer to the plea and overruling the

plaintiff's motion to defer proceedings pending the final determination of the proceedings in the State court; the order of the court made December 10th, 1895, overruling the plaintiff's motion to remand; final judgment aforesaid this day entered.

The petition for writ of error and assignment of errors referred to in the foregoing order was and is in words and figures as follows, to wit:

114 Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff prays for a writ of error to the Supreme Court of the United States upon the question alone of the jurisdiction of this court and assigns for error:

First. That this court erred in overruling the motion of this plaintiff, filed December 8th, 1894, to remand this cause to the State court.

Second. That this court erred in the order entered December 22nd, 1894, permitting the defendant to file an amended petition for removal and affidavits.

Third. That this court erred in its order made January 7th, 1895, overruling the motion of this plaintiff to remand this cause to the State court.

Fourth. That this court erred in its order entered December 10th, 1895, sustaining the demurrer to plaintiff's plea to the jurisdiction of the court and in overruling plaintiff's motion to defer proceedings pending the final determination of proceedings in the State court.

115 Fifth. That this court erred in its order entered December 10th, 1895, overruling the plaintiff's motion to remand this cause to the State court.

Sixth. That this court erred in entertaining jurisdiction to render the final judgment herein dismissing the petition at plaintiff's costs, and overruling all objections of plaintiff to the jurisdiction of the court.

——— ———,
Attorney for Plaintiff.

And on the same day, to wit, on February 14th, 1896, a writ of error issued herein; said writ of error was and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John T. Powers, plaintiff, and The Chesapeake & Ohio Railway Company, defendant, a manifest error hath happened, to the great damage of the said John T. Powers, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties
116 aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 14th day of February, 1896, in the year of our Lord one thousand eight hundred and ninety-six.

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Allowed by—
JOHN W. BARR, *Judge.*

And on the same day, to wit, on February 14th, 1896, a bond was filed therewith; said bond was and is in words and figures as follows, to wit:

117 Know all men by these presents that we, John T. Powers, as principal, and John O'Meara, as surety, are held and firmly bound unto The Chesapeake & Ohio Railway Company in the full and just sum of five hundred ($500) dollars, to be paid to the said The Chesapeake & Ohio Railway Company, its successors, certain attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the circuit court of the United States for the district of Kentucky, at Covington holden, in a suit depending in said court between John T. Powers, plaintiff, and The Chesapeake and Ohio Railway Company, defendant, and numbered 1864

on the docket of said court, a judgment was rendered against the said John T. Powers, dismissing his petition at his costs and overruling his objections to the jurisdiction of said court, and the court certified the question of jurisdiction alone to the Supreme Court of the United States, and the said John T. Powers having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a
118 citation directed to the said The Chesapeake and Ohio Railway Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said John T. Powers shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN T. POWERS. [SEAL.]
JOHN O'MEARA. [SEAL.]

Witness:
WM. GOEBEL.

Approved by—
JOHN W. BARR, *Judge.*

And on a day following, to wit, on February 15th, 1896, the following citation to defendant in error was filed herein by the clerk, having been issued by Hon. John W. Barr on February 14th, 1896; said citation was and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

To the Chesapeake & Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear
119 at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein John T. Powers is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 14th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JNO. W. BARR, *Judge.*

And upon the said citation appears the following endorsement, viz:

CINCINNATI, *M'ch* 5, 1896.

Service of citation of error in above case accepted this March 5th, 1896.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By CHARLES B. SIMRALL, *Att'y.*

120 THE UNITED STATES OF AMERICA, *ss:*

To the Chesapeake and Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein John T. Powers is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 14th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JNO. W. BARR, *Judge.*

CINCINNATI, *M'ch 5th*, 1896.

Service of citation of errors in above case accepted this March 5th, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By CHARLES B. SIMRALL, *Att'y.*

[Endorsed:] United States circuit court, dist. of Ky. No. 1864. John T. Powers *vs.* C. & O. R'y Co. Citation to defendant in error. Filed Feb'y 15th, 1896. Jos. C. Finnell, clerk. (24.)

121 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John T. Powers, plaintiff, and The Chesapeake and Ohio Railway Company, defendant, a manifest error hath happened, to the great damage of the said John T. Powers, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of February, 1896, in the year of our Lord one thousand eight hundred and ninety-six.

JOS. C. FINNELL,
Clerk of the Circuit Court of the U. S.
for the District of Kentucky.

Allowed by—
JNO. W. BARR, *Judge.*

[Endorsed:] United States circuit court, dist. of Ky. No. 1864. John T. Powers *vs.* C. & O. R'y Co. Writ of error. Filed *filed* Feb'y 15, 1896. Jos. C. Finnell, clerk. (22.)

122 THE UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

I, Joseph C. Finnell, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in the clerk's office of said court, and also original writ of error and citation.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Covington, Ky., this 6th day of March, A. D. 1896.

JOS. C. FINNELL, *Clerk,*
By L. M. VAN DYKE, *D. C.*

Endorsed on cover: Case No. 16,228. Kentucky C. C. U. S. Term No., 144. John T. Powers, plaintiff in error, *vs.* The Chesapeake & Ohio Railway Company. Filed March 19th, 1896.